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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

STATE OF TEXAS,

Petitioner

V.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Whether the "unreasonable burden" standard and the "public interest" standard in 49 U.S.C. §10935(e)(1)(A) are separate and distinct standards with separate and distinct elements of proof.

Whether this decision by the Fifth Circuit directly conflicts with the decision of the D.C. Circuit in *Pennsylvania Public Utility Commission v. United States*, thereby creating contrary states of law between those two circuits on the same matter.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, Greyhound Lines, Inc. participated below as intervenor.

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STATE OF TEXAS,

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UNITED STATES OF AMERICA AND
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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Attorney General, on behalf of the State of Texas, petitions for writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, pp.1-16) is reported at 756 F.2d 419. The decision of the Interstate Commerce Commission (Appendix C, *infra*, pp. 1-26) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals (Appendix B, *infra*, pp. 1-2) was entered on April 4, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

STATUTES INVOLVED

Pertinent provisions of the Bus Regulatory Reform Act of 1982, 49 U.S.C. 10935 et seq., (sometimes referred to as "Bus Act") are set forth at Appendix D, *infra*, pp. 1-6.

STATEMENT OF THE CASE

I. THE STATUTORY LAW APPLICABLE

The Bus Act establishes a two-stage procedure by which private motor common carrier of passengers with intrastate and interstate authority over a particular route can receive permission to discontinue or reduce intrastate service on that route. First, the carrier must request permission to discontinue or reduce the intrastate service from the state regulatory agency having authority to grant such permission. State law and state agency procedures apply at this first stage of the discontinuance process. If the state agency denies the request in whole or in part or does not act finally in whole or in part by the 120th day after the carrier made the request, the carrier may petition the Commission for such permission. 49 U.S.C. §10935(a).

In the second stage of the procedure, the Interstate Commerce Commission ("ICC" or "Commission") determines whether to grant the carrier permission to discontinue its intrastate service. Once a carrier files a petition with the ICC and notifies the proper state and local authorities listed in the federal statute, any person (including an agency or instrumentality of a state or local government) may file an objection with the ICC to the granting of permission to discontinue or reduce transportation. *Id.*, §10935(b), (c). If no person objects to the carrier's request for the ICC's consent to discontinue or reduce such service within 20 days after the carrier files its petition, the ICC shall grant its consent. *Id.*, § 10935(d). The ICC can only grant permission to a carrier to discontinue or reduce intrastate transportation over any route to any point, however, if the carrier has concurrently applied for ICC authority to discontinue or reduce interstate transportation over such route to such point and the ICC has granted or will grant such authority. *Id.*, §10935(e)(3).

If the carrier originally received its interstate authority to transport over the route on or before August 1, 1982, the ICC shall grant the permission requested unless it finds, on the basis of evidence presented by an objector, that (1) such discontinuances or reduction is not consistent with the public interest, *or* that (2) the continuance of the transportation will not consitute an unreasonable burden on interstate commerce. *Id.*, §10935(e)(1)(A). The subdivision does not explicitly define "public interest" or "unreasonable burden on interstate commerce". If the carrier received its interstate authority *after* August 1, 1982, the ICC shall grant the permission requested unless it finds, on the basis of the evidence presented by an objector, that the continuance of the transportation will not constitute an unreasonable burden on interstate commerce. *Id.*, §10935(e)(2)(A). As to this latter provision, the statute states that the continuance of transportation does not constitute an unreasonable burden on interstate commerce only if: (a) discontinuance or reduction of such transportation is not consistent with the public interest, *and* (b) the interstate and intrastate revenues from such service under reasonable pricing practices are not less than the variable costs of providing the transportation proposed to be discontinued or reduced. *Id.*

In making its determination in cases involving carriers that received interstate authority to operate on the route *before* August 1, 1982, the statute directs the ICC to accord great weight to the extent to which intrastate and interstate revenues received for providing the transportation proposed for discontinuance or reduction are less than the variable costs of providing such transportation, which includes depreciation for equipment. *The carrier filing the petition* has the burden of proving the amount of interstate and intrastate revenues received for the service and the variable costs of providing the transportation. *Id.*, §10935(g)(1). In all cases, the ICC must consider, to the extent applicable, at least (1) the national transportation policy of 49 U.S.C. §10101; (2) whether a financially responsible entity has offered or given the carrier assistance to provide the transportation service at issue; and (3) whether the transportation is the last motor carrier of passenger service to a point at which the carrier proposes to discontinue service and whether a reasonable alternative to such service is availabale. *Id.*, §10935(g)(2).

II. THE PROCEEDINGS BELOW

Greyhound Lines, Inc. ("Greyhound") filed an application with the Railroad Commission of Texas ("RCT") on December 27, 1982, seeking permission to discontinue intrastate operations over an entire route between Houston and San Antonio (involving service to 12 off-route points) and to 46 other service points on nine other routes, all authorized on an interstate basis *prior* to April 1, 1982. The RCT held public hearings in eight communities affected by the proposed discontinuances and heard 235 concerned citizens opposing Greyhound's application to discontinue. A proposal for decision recommending the denial of the application issued on April 22, 1983. Greyhound filed exceptions to the proposal, but the RCT issued a final order adopting the proposal for decision, thereby denying the requested discontinuance on May 16, 1983.

On September 7, 1983, Greyhound submitted a petition to discontinue bus service to the ICC, as permitted under the Bus Act. The petition requested permission to discontinue service to 58 points in Texas for which the RCT had denied permission to discontinue. The RCT timely objected to Greyhound's discontinuance petition on September 26, 1983.Greyhound filed its rebuttal to the objectors' arguments on October 7, 1983.

The ICC granted Greyhound permission to discontinue its service at 38 of the 58 requested points in Decision No. MC-1515 (Sub-No. 343), *Petition of Greyhound Lines, Inc. for Review of a Decision of the Railroad Commission of Texas Pursuant to 49 U.S.C. §10935,* decided December 12, 1983. (Appendix C, *infra,*). The ICC found that the RCT had failed to prove that discontinuance of service was inconsistent with the public interest or that continuance of service did not constitute an unreasonable burden upon interstate commerce as to the San Antonio-Houston route (encompassing 12 off-route points of service) and as to 26 off-route points on the nine other routes. Although the ICC determined that Greyhound did not prove that the variable costs of continuing the service proposed for a discontinuance exceeded the revenues generated by that service, it nevertheless granted permission to discontinue transportation to those 38 points. The decision gave Greyhound permission to discontinue service at the 26 off-route points im-

mediately and on the San Antonio-Houston route on February 25, 1984.

The State of Texas ("Texas" or "State") initiated the present appeal by filing a Petition for Review in the Court of Appeals on February 8, 1984, on behalf of the RCT. The petition sought judicial invalidation of the order in ICC Decision No. MC-1515 (Sub-No. 343). By opinion of the Court of Appeals dated April 4, 1985, that Court denied the Petition for Review and upheld the ICC's order (Appendix A, *infra*).

REASONS FOR GRANTING THE PETITION

I.

THE COURT OF APPEALS FAILED TO RECOGNIZE THAT THE UNREASONABLE BURDEN STANDARD AND THE PUBLIC INTEREST STANDARD IN 49 U.S.C. §10935(e)(1)(A) ARE SEPARATE AND DISTINCT STANDARDS COMPRISED OF SEPARATE AND DISTINCT ELEMENTS OF PROOF.

The relevant provision of the Bus Act states that the Commission must grant permission to discontinue service unless it finds that an objector proves that "such discontinuance or reduction is not consistent with the public interest *or* that continuing the transportation, without the proposed discontinuance or reduction, will not constitute an unreasonable burden on interstate commerce." 49 U.S.C. §10935(e)(1)(A) (emphasis added). In the present case, the Fifth Circuit erroneously concluded that the public interest standard and the unreasonable burden standard in 49 U.S.C. §10935(e)(1)(A) are not separate and distinct standards embodying separate and distinct elements of proof. The lower court accomplished this by holding that both the considerations in §10935(g)(1), (variable cost and revenues) and §10935(g)(2),(national transportation policy and possibilities of subsidies and alternative service), were factors to be included in *both* of the standards, thus making the burden the same under each of the standards. Texas had taken the position that the (g)(1) considerations alone applied to the "unreasonable burden" standard.

This reading of the objector's burden of proof under §10935(e)(1)(A) runs counter to a well-settled rule of statutory construction: "[t]he use of a disjunctive in a statute indicates alternatives and requires that those alternatives be treated *separately.*" *Quindlen v. Prudential Insurance Company of America,* 482 F.2d 876 (5th Cir. 1973) (emphasis added). The Court in *Quindlen* held that the disjunctive "nor," which separated two clauses in an insurance statute, required a finding that the statutory language following the disjunctive did not apply to the subject matter preceding the disjunctive. 482 F.2d at 878. Consequently, the Court determined that the two clauses in the statute described two separate categories of insurance policies. The Fourth Circuit in *Azure v. Morton,* 514 F.2d 897 (1975) likewise read the disjunctive "or" to require a similar finding. It held that a statute's use of "or" to separate two independent subsections fashioned two categories of persons eligible for funds under the statute. This case law implicitly acknowledges that a court must assume that the ordinary meaning of the statutory language used by Congress expresses the legislative purpose in enacting the statute. *Immigration and Naturalization Service v. Phimpathya,* 464 U.S. 183 (1984); *American Tobacco Co. v. Patterson,* 456 U.S. 63, 68 (1982). Accordingly, this Court in *Reiter v. Sonotone Corp.,* 442 U.S. 330, 338-39 (1979) held that a statutory construction ignoring the accepted meaning of the disjunctive "or" robs the terms separated by the disjunctive of their independent significance and separate meanings.[1]

The Court below ignored these rules in the guise of deference to agency interpretation when legislative intent is not clear, pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* _____U.S._____, 104 S.Ct. 2778. However, the legislative history of the Bus Act is not burdened with such

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1. Texas acknowledges that on rare occasions the courts have refused to read the word "or" as a disjunctive because a strict grammatical construction of the word frustrates legislative intent. *See, e.g., United States v. Moore,* 613 F.2d 1029, 1040 (D.C. Cir. 1979), *cert. denied,* 446 U.S. 954 (1980). As discussed herein, the legislative intent supports Texas' argument that Congress intended two separate standards comprised of separate elements to exist within §10935(e)(1)(A).

ambiguity. In discussing the original House exit provision in the Bus Act, Representative Rahall of West Virginia clearly segregated the three criteria finally incorporated into §10935(g)(2) as constituting "the public interest test of this legislation." 127 Cong. Rec. H8591 (daily ed. Nov. 11, 1981) (statement of Rep. Rahall).[2] In adopting the Senate's provisions involving a comparison of variable costs and revenues (which Texas contends is the standard) in the final version of the statute, Congress did not expressly refute the earlier understanding that the public interest standard solely consisted of the three elements stated in §10935(g)(2). *See* also the legislative history cited by the D.C. Circuit in *Pennsylvania Public Utility Commission v. United States*, 749 F.2d 841 (D.C. Cir. — 1984), discussed *infra*.

The flaw in the single standard reading of §10935(e)(1)(A), is that the burdens of proof under that provision and §10935(e)(2)(A) are the same; each burden necessarily requires an identical consideration of the same factors in every case, i.e. variable costs and revenues, the national transportation policy, the offer or receipt of a subsidy, and reasonable and available alternative service.[3] In enacting two distinct provisions addressing discontinuance determinations for routes authorized *before* August 1, 1982, and *after* that date, Congress did not intend that the Commission read those provisions identically.

Indeed, the ICC has acknowledged that the burden of proof differs under §10935(e)(1)(A) and §10935(e)(2)(A). In its notice

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2. Earlier in the floor debate, Representative Anderson assured Representative Rahall that the public interest test had equal emphasis with economic considerations. 127 Cong. Rec. H8591 (daily ed. Nov. 11, 1981) (statement of Rep. Anderson). Therefore, the public interest test and the economically-based unreasonable burden test are separate and equal standards; an objector's success in meeting its burden of proof under *either* standard will rebut the presumption favoring discontinuance.

3. This statement implicitly disregards Respondent's contention below that §10935(3)(1)(A) does not require a comparison of variable costs and revenues if the carrier decides not to present such a comparison. Texas contends that a carrier *must* present evidence of variable costs and revenues under §10935(g)(1) in all cases decided under §10935(3)(1)(A). *See* Point II of this brief.

of proposed rulemaking, the Commission stated that "Congress has established a situation where the discontinuance of service over new routes is to be easier than over old routes." 47 Fed. Reg. 42928 (1982). Texas' reading of the statute supports this legislative intent. Under that reading, discontinuance over old routes is more difficult because an objector need only prove that variable costs do not exceed revenues under the unreasonable burden standard *or* that the three factors comprising the public interest test militate against discontinuance.[4] In contrast, discontinuance over new routes is easier because an objector must prove that variable costs do not exceed revenues *and* that the three public interest factors do not support discontinuance.

II.

THE DECISION OF THE COURT BELOW DIRECTLY CONFLICTS WITH THAT OF ANOTHER CIRCUIT.

In *Pennsylvania Public Utility Commission v. United States*, 749 F.2d 841 (D.C. Cir. — 1984) ("PaPuc"), the Court of Appeals concluded that the ICC, with respect to a particular route over which the carrier sought discontinuance permission, erroneously interpreted §10935 of the Bus Act and failed to base its findings in reasoned decisionmaking. Accordingly, the Court of Appeals remanded to the agency the portion of the ICC's order that erroneously granted discontinuance permission over the particular route. It specifically instructed the ICC to consider the two *distinct* standards required by the statute (whether discontinuance of service will be inconsistent with the public interest and whether continuance of service will

4. The Commission and Greyhound asserted below that §10935(g)(2) requires consideration of the public interest factors in all §10935(e)(1)(A) cases. The language of §10935(g)(2), however, states that the Commission must consider these factors only "*to the extent applicable.*" Therefore, if a protestant chooses to only prove that the carrier has not proven its variable costs to exceed its revenues under the unreasonable burden standard, then the public interest factors are not applicable. Such factors would apply only if the protestant challenges the discontinuance under the public interest standard of §10935(e)(1)(A) by addressing in whole or in part the three factors in §10935(g)(2).

unreasonably burden interstate commerce), to adhere to the congressional intent behind the Bus Act, and to base its statutorily required findings on evidence in the administrative record.

Upon determining that §10935 contains two separate and distinct standards which an objector may employ to prevent discontinuance, the court in *PaPuc* also analyzed the ICC's erroneous interpretation of those standards. In holding that the unreasonable burden test is an economic-oriented test that entails a determination of whether the carrier's variable costs exceed its revenues, the court found that the ICC's inference of "some burden" on interstate commerce (as deduced from the mere existence of the carrier's exit petition) did not meet the requirement imposed by §10935 that the ICC consider whether continuance of service would not constitute an "unreasonable burden" on interstate commerce. Similarly, the ICC in the decision appealed here determined that continuance of service over the Houston-San Antonio route would impose "some burden" on interstate commerce but did not determine if its finding of full economic costs (rather than variable costs) in excess of revenues constituted an unreasonable burden, as required by the statute. As to other points over which Greyhound sought discontinuance permission, the carrier's failure to evidence its variable costs and revenues under the unreasonable burden standard necessarily prevented the ICC from making a finding that continuance of service to those points would unreasonably burden interstate commerce.

Texas contends that the opinion of the District of Columbia Court of Appeals in remanding part of the ICC's order in *PaPuc* directly contradicts the decision of the Fifth Circuit in the instant case. In determining the correct statutory standard under §10935, the Court in *PaPuc* read the exit provision to contain a disjunctive standard: the ICC cannot grant discontinuance permission if an objector demonstrates that discontinuance of service is inconsistent with the public interest *or* that continuance of service would not unreasonably burden interstate commerce. The Court in *PaPuc* specifically held that Congress intended the ICC to consider two separate issues before granting a discontinuance request; the ICC cannot weigh the two issues against each other in determining its decision. The

"balancing trick" performed by the ICC in the agency decision on appeal here—weighing "some" economic burden on interstate commerce against various public interest factors—is exactly the type of decisionmaking for which the court in *PaPuc* rebuked the ICC and the ground upon which that court based its remand to the agency.

In the present case, the Fifth Circuit clearly indicates an inclination toward the result reached by the D.C. Circuit and urged by Texas. 756 F.2d at pp. 426, 424. However, the Fifth Circuit felt constrained in light of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, supra,* to adopt an agency interpretation of the statute administered by that agency. While *Chevron* does stand for the proposition that, absent Congressional intent, the courts should defer to agency interpretation of an ambiguous portion of a statute which the agency must implement, the Fifth Circuit's opinion goes beyond this proposition. The Court of Appeals is in effect saying that even if an agency clearly misreads an unambiguous part of its statute (e.g. substituting "and" for "or") the Court's hands are tied from correcting the mistake. This cannot be the status of the law. Because of this misreading, and the conflict between the two circuits on the interpretation of an important statute, this Court should grant the writ prayed for to rectify the confusing situation.

CONCLUSION

The State of Texas prays that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

The STATE OF TEXAS,

Petitioner,

v.

UNITED STATES of America and Interstate Commerce Commission,

Respondents.

NO. 84-4086

United States Court of Appeals,
Fifth Circuit

April 4, 1985.

Before RUBIN, TATE, and HILL, Circuit Judges.

TATE, Circuit Judge:

The State of Texas ("Texas") seeks review of an order issued by the Interstate Commerce Commission ("the Commission") pursuant to Section 16 of the Bus Regulatory Reform Act of 1982, 49 U.S.C. § 10935 ("the Bus Act"), granting Greyhound Lines, Inc. ("Greyhound") permission to discontinue bus service over certain routes within the state. Texas petitions this court for review of the Commission's order, and Greyhound intervenes in support of the Commission. We affirm.

Following enactment of the Bus Act, Greyhound applied to the Railroad Commission of Texas to discontinue intrastate bus service on its interstate route between Houston and San Antonio and at forty-six off-route points on nine other interstate routes. Upon the state agency's denial of its application, Greyhound then petitioned the federal Interstate Commerce Commission to discontinue such routes, as authorized by Section 16 of the Bus Act, 49 U.S.C. § 10935. The Interstate Commerce Commission in late 1983 issued an order granting Greyhound's request with regard to the Houston-San Antonio route and to 26 (of the 46) off-route points. Texas' petition for review of this order is now before us.

Overview

As will be described more fully below in *I, infra*, the 1982 Bus Act empowered the Commission to authorize discontinuance of intrastate service, despite the refusal of the state regulatory agency to permit cessation of such service. However, a more stringent standard was provided with regard to discontinuance of service over routes authorized prior to August 1, 1982 (the year of passage of the Act), than over those that were to be authorized subsequent to that date. *See II infra.* The more stringent standard reflected Congress' concern "to ensure that regulatory reform of the bus industry would protect the public interest in continued service to rural America." *Pennsylvania Public Utility Commission v. United States*, 749 F.2d 841, 844 (D.C. Cir. 1984).

The principal issue for our review is raised by Texas' contention that-- by permitting Greyhound to discontinue service to numerous intrastate points despite Greyhound's failure to prove it sustained an operating loss in providing such service— the Commission misconstrued the statute so as to eliminate the Congressionally intended protection to smaller communities against discontinuance of business service. The construction of the Bus Act for which Texas contends was substantially adopted by the District of Columbia Circuit, reversing the Commission, as in accord "with the clear congressional intent behind the Bus Act." *Pennsylvania Public Utility Commission, supra*, 749 F.2d at 847.[1]

However, two other circuits have decided to the contrary, when faced with the issue of statutory construction now before us, and have upheld the construction of the statute now relied upon by the Commission. *Auville v. Interstate Commerce Commission*, 747 F.2d 179, 184-85 (4th Cir.1984); *Humphrey v. United States*, 745 F.2d 1166, 1168-69 (8th Cir.1984). In *Auville*, the court did so specifically in deference under applicable principles to the Commission's interpretation of the statute en-

1. Indeed, in an earlier decision the Commission itself had adopted such construction. The Commission's change of position is the basis for Texas' further contention on this review that it was denied due process by the Commission's change of interpretation while the present proceeding were pending before it. *See IV infra*, in the text.

trusted to its administration. 747 F.2d at 184.

Ultimately, we affirm the Commission's interpretation of the statute as "a permissible construction of the statute" thus requiring our deference to the Commission's interpretation thereof. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, —U.S..—,—. 104 S.Ct. 2778, 2782 & n. 11, 81 L.Ed.2d 694 (1984); *Western Coal Traffic League v. United States*, 719 F.2d 772, 773, 777 (5th Cir. 1983) (en banc), *cert. denied*, —U.S.—, 104 S.Ct. 2160, 80 L.Ed.2d 545 (1984). even though— absent such requisite deference to the Commission's construction—this panel may well have decided that the construction accorded to the statutory provision by the District of Columbia Court of Appeal is more in accord with their legislative intent.

I. Section 16 of the Bus Act, 49 U.S.C. § 10935

Before 1982, state regulatory commissions had exclusive jurisdiction to grant or deny requests to discontinue intrastate bus services. Congress found that these commissions often "created impediments that prevented [interstate carriers] from abandoning unproductive routes." *Humphrey v. United States*, 745 F.2d 1166, 1168 (8th Cir.1984). To overcome this problem (but with greater safeguards against discontinuance of authorized pre-1982 service), Congress enacted Section 16 of the Bus Regulatory Reform Act of 1982, Pub.L. 97-261, §16(a), 96 Stat. 1115. *See* 49 U.S.C. § 10101(a)(3)(c); S.Rep. No. 411, 97th Cong., 2d Sess. 7-10, 25, *reprinted in* 1982 U.S. Code Cong. & Ad.News 2308, 2314-17, 2332 ("Senate Report"); H.R.Rep. No. 334, 97th Cong., 1st Sess. 24-25 (1981) ("House Report"); 128 Cong.Rec.H. 6692 (daily ed. Aug. 19, 1983) (statement of Rep. Anderson); *Id.* at H. 6693-94 (statement of Rep. Clausen). This Section of the Bus Act, which is now codified at 49 U.S.C. § 10935, sought to remedy the problem by giving the Interstate Commerce Commission final authority over requests to discontinue intrastate bus service.

Under § 10935, an interstate carrier, such as Greyhound, must follow a two-step process to obtain permission to discontinue intrastate bus service on a route over which the carrier has intrastate and interstate authority. The first step is to sub-

mit an application to the state regulatory commission with jurisdiction to grant the discontinuance. If the state commission denies the request or fails to act on it within a specified period, step two comes into play: the carrier may petition the Interstate Commerce Commission for permission to discontinue the service. 49 U.S.C. §§ 10935(a), 10935(e)(3). If no timely objection to the petition is filed,[2] the Commission must approve it. § 10935(d).

However, if timely objection *is* filed, the Commission "shall" grant it "*unless*" the objector makes certain showings, which differ as to whether discontinuance is sought as to a route required to be served by the carrier was authorized *before* August 1, 1982 (as were the present routes), § 10935(e)(1), or *after* that date, § 10935(e)(2). The statute also requires certain considerations to be given when the application is to discontinue a 1982 route under (e)(1) only, 49 U.S.C. § 10935(g)(1), as well as certain other considerations to be given when discontinuance of the route is sought *either* under (e)(1) (pre-1982 routes) or (e)(2) (routes authorized after 1982), 49 U.S.C. § 10935(g)(2). The statutory ambiguity resulting from the interplay between these differing standards and requirements *(see II infra)* is the basis of the conflicting interpretations of § 10935(e) now before us, with regard to the showing required before pre-1982 intrastate bus service may be discontinued.

II. Discontinuance: pre-1982 versus post-1982

When discontinuance is sought over objection, § 10935(e)(1) & (2) provide for the grant or denial of the application unless the objector makes certain showings, depending upon whether the route upon which discontinuance is sought was authorized before or after August 1, 1982:

a. As to routes authorized *before* the 1982 date, the Commission "shall" grant the application "*unless*" the objector shows that the discontinunace "is not consistent with the public ser-

2. Section 10935(c) provides that "[a]ny person (including a department, agency, or instrumentality of a State or local government) may object to the Commission to the granting of permission to any [interstate] carrier to discontinue or reduce transportation under this section." Objections must be filed within twenty days after the petition is filed. § 10935(d).

vice *or* that continuing the transportation will not constitute an unreasonable burden on interstate commerce.[3] § 10935(e)(1)(A) (emphasis added). Thus, discontinuance will be denied if the objector proves that *either* the "public interest" *or* the "burden on interstate commerce" test is not met.

b. As to routes authorized *after* the 1982 date, the Commission "shall" grant the application for discontinuance "*unless*" the objector proves that continuing the transportation "will not constitute an unreasonable burden on interstate commerce," with continuance being an unreasonable burden unless the objector proves that discontinuance "is not consistent with the public interest *and* that ... revenues from such service ... are not less than the variable costs of providing the transportation proposed to be discontinued."[4] §10935(3)(2)(A) (emphasis added). Thus, to defeat continuance as to post-1982 routes, the objector must prove *both* that discontinuance is inconsistent with the public interest *and* also that the variable costs do not exceed the revenues.

The statute further provides that, with regard *(only)* to applications to discontinue pre-1982 service under (e)(1), the Com-

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3. 49 U.S.C. § 10935(e)(1)(A) provides:

> ...the Commission shall grant such permission [to discontinue a *pre*-1982 route] unless the Commission finds, on the basis of evidence presented by the person objecting to the granting of such permission, that such discontinuance or reduction is not consistent with the public interest or that continuing the transportation, without the proposed discontinuance or reduction will not constitute an unreasonable burden on interstate commerce.

4. 49 U.S.C. § 10935(e)(2)(A) provides:

> ...the Commission shall grant such permission unless the Commission finds, on the basis of evidence presented by the person objecting to the granting of such permission, that continuing the transportation, without the proposed discontinuance or reduction, will not constitute an unreasonable burden on interstate commerce. For the purposes of this paragraph, continuance of the transportation would not constitute an unreasonable burden on interstate commerce only if discontinuance or reduction of such transportation is not consistent with the public interest and the interstate and intrastate revenues from such service under reasonable pricing practices are not less than the variable costs of providing the transportation proposed to be discontinued or reduced.

mission "shall give great weight" to the extent to which revenues exceed "variable costs" of providing the service, with the carrier having the burden to prove "the amount" of its revenues received for providing the service and also "the variable costs" of providing it[5] § 10935(g)(1). Congress did not define the term "variable costs" in the statute, and the Commerce Commission chose not to define the term in its regulations. *See* 47 Fed.Reg. 42928-42929 (1982). Although the components of variable costs were not defined, in the context of the Commission's discussion in the present case they seem to be the day-to-day operating costs of providing the service, as contrasted with the "full economic costs" (overhead, etc.) involved.

In the present instance, the Commission found that Greyhound did not meet its burden of proving that its variable costs exceeded the revenues for the routes to be discontinued. At the same time, for reasons to be summarized later, it found that Texas did not meet *its* burden of proving that discontinuance was not justified under either the "public interest" test or the "burden on interstate commerce test."

Texas argues that, contrary to the demonstrated congressional intent, the Commission has in effect used the same test—the ecomonic burden on interstate commerce—to grant a discontinaunce to intrastate service authorized pre-1982 as would be used to grant the discontinuance to service authorized post-1982. Texas persuasively argues that, under the statutory provisions in question, the "public interest" test for

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5. 49 U.S.C. § 10935(g)(1) provides:

> In making a finding under subsection (e)(1) of this section, the Commission shall accord great weight to the extent to which interstate and intrastate revenues received for providing the transportation proposed to be discontinued or reduced are less than the variable costs of providing such transportation, including depreciation for revenue equipment. For purposes of the preceding sentence, the carrier filing a petition for permission to discontinue or reduce service shall have the burden of proving the amount of the interstate and intrastate revenues received for providing the transportation and the variable costs of providing the transportation.

continued service[6] is distinct from the "burden on interstate commerce test,"[7] with the latter being statutorily denoted as an economic test only essentially being met only where the variable costs exceed the revenues of the services sought to be discontinued.[8]

We agree with Texas that the statute is at least ambiguous in the respects noted. With regard to discontinuance of pre-1982 service, the disjunctive "or" test provided by (e)(1), and the apparent dichotomy of "public interest" and variable-costs "interstate-commerce-burden" expressed by (e)(2), the "public interest" in continuance of the service might reasonably be contrued as based on non-economic factors, and the "burden on interstate commerce" as on economic factors (unprofitability), with the opponent to discontinuance of pre-1982 service required to prove only the public's interest in continued service (and with the carrier, under (g)(1), bearing the burden of proving that its variable costs exceeded its attributable revenues before an unreasonable burden on interstate commerce

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6. In its unpublished opinion of December 12, 1983, *Petition of Greyhound Lines, Inc.*, No. MC-1515 (Sub.No. 343), the Commission equated "public interest" as including "the needs of passengers and shippers," and "to provide for and maintain intrastate bus services to small communities and small shippers," although it also stated that "[w]hether the public interest supports continuation ... includes an analysis of the national transportation policy, whether a subsidy has been offered, and whether reasonable alternative service is available." P. 10 of opinion. It also included, however, economic costs in its public interest analysis. *See, e.g.*, p. 12.

7. The Commission's opinion, cited note 6 *supra*, mainly cited as an unreasonable burden on interstate commerce Greyhound's evidence of unprofitability (although the revenues did not establish they were below variable costs, the Commission stated they were "clearly below full costs," involving cross-subsidization by interstate revenues of these intrastate costs), p. 12, and it also cited Greyhound's argument of a burden on interstate commerce as arising not only from these economic costs but also from the circumstances that elimination of these allegedly unnecessary intrastate stops "would provide the majority of its passengers with improved and better services," p. 12.

8. Texas then concludes that, since the Commission found that Greyhound did not prove that variable costs interstate-commerce-burden exceeded revenues, the Commission erred as a matter of law in granting Greyhounds's application to discontinue the service in question.

resulted). Indeed, in *Pennsylvania Public Utility Commission, supra,* the District of Columbia's analysis of the statute, reinforced by its extensive examination of the legislative history, 749 F.2d at 850-53, reached a conclusion much similar to the construction advanced by Texas that "public interest" and "burden on interstate commerce" concerns were distinct requirements and that the Commission was not authorized by the statute, as it did in the present case also, to balance the public interest and the financial burden concerns against one another.

Unlike the District of Columbia Circuit, however, we cannot find clear congressional intent for such construction, either from the words of the statute itself (or, for that matter, from its legislative history). Required as we are to defer to the Commission in its resolution of statutory ambiguities, we are unable to find that the Commission's interpretation is contrary to the clear intent of Congress (although, absent such deference, a majority of the panel might well resolve the ambiguity otherwise than did the Commission).

With regard to the statute, (g)(1) (quoted in note 5 *supra)* provides, with specific reference to discontinuance (only) of pre-1982 service, that "[i]n making *a* finding" (emphasis added) the Commission "shall accord *great weight*" (only) to the variable costs factor in making a finding under (e)(1)—which finding would include application of both tests ("public interest" and "interstate burden"). The statute does not, as Texas seems to argue, require that conclusive weight be given to this factor under either test. Furthermore, of importance, the statute in (g)(2) provides that "[i]n making *a* finding" under *either* (e)(1) (pre-1982 service) *or* (e)(2) (service authorized post-1982), the Commission shall consider the national transportation policy, the offer or receipt of a subsidy, and the availability of reasonable alternative services.[9] Thus, on its

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9. 49 U.S.C. § 10935(g)(2) provides:

> In making a finding under subsection (e)(1) or (e)(2) of this section, the Commission shall consider, to the extent applicable, at least—
> (A) the national transportation policy of section 10101 of this title;
> (B) Whether the motor common carrier of passengers has received
>
> *(footnote continued on next page)*

face, the ambiguous statute is, in our opinion, reasonably susceptible of the construction afforded it by the Commission; that, in making a (single) finding that an (e)(1) (pre-1982) objector did or did not meet its burden of proving either that public interest or no-interstate burden justified denial of the continuance, the Commission under the statute is entitled to weigh also the national transportation policy (which includes economic factors), 49 U.S.C. § 10101(a)(2) (quoted in note 9 *supra*), in determining that the public interest in maintenance of the service is outweighed by the economic costs of doing so.

Thus, on the face of the statute, ambiguious though it may be, we cannot say that the Commission's construction of it was not permissible under its terms.

Where "legislative delegation to an agency on a particular question is implicit rather than explicit ..., a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator," *Chevron U.S.A., Inc., supra*, — U.S. at —, 104 S.Ct. at 2782,

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(*footnote continued from previous page*)

an offer of, or is receiving, financial assistance to provide the transportation to be discontinued or reduced from a financially responsible person (including a governmental authority); and

(C) in the case of a petition to discontinue transportation to any point, whether the transportation is the last motor carrier of passenger service to such point and whether a reasonable alternative to such service is available.

The "national transportation policy" cited in this provision requires the Commerce Commission, "in regulating transportation by motor carriers:"

> to promote competition and efficient transportation services in order to (A) meet the needs of shippers, receivers, passengers and consumers; (B) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public; (C) allow the most productive use of equipment and energy resources; (D) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions; (E) provide and maintain service to small communities and small shippers and intrastate bus services; (F) provide and maintain commuter bus operations; (G) improve and maintain a sound, safe and competitive privately owned motor carrier system...

49 U.S.C. § 10101(a)(2).

and it must uphold the administrative construction even though it is not "the reading the court would have reached if the question initially had arisen in a judicial proceeding," *id*, at n. 11. As summarized in that opinion:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress had directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. — U.S. at —, 104 S.Ct. at 2781-82.[10]

III. Legislative History

In *Pennsylvania Public Utility Commission, supra*, the court found from extensive reference to the legislative history a clear congressional intent contrary to the construction adopted by the Commission and that today we uphold. The Supreme Court's expression in *Chevron, U.S.A., Inc, supra*, might be construed to mean that an administrative construction of a facially ambiguous construction can never be overturned by judicial resort to legislative history from which the court finds

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10. In our 1983 en banc decision in *Western Coal, supra*, we had somewhat similarly formulated the test: In considering the Commission's decision, "[w]e begin, as we must, with a recognition of the limited role this court plays in reviewing an administrative agency's construction of its statutory authority." 719 F.2d at 777. In all such cases, "we must defer to the agency's interpretation of the statute and affirm that interpretation if 'it has a reasonable basis in law.' That the members of this Court might have construed the statute differently is inconsequential." *Id.* (Citations omitted.)

legislative intent clearly contrary to that of the administrative construction, although we need not so determine now.[11] For, with great respect for the court that found otherwise in *Pennsylvania Public Utility Commission, supra,* we are unable to find that the present statute presents such a case—although, we must admit, its ascription of legislative intent based upon the legislative interest is a reasonable one.[12]

The legislative history as to the exit provision of § 10935(e) is itself not free from ambiguity. Section 10935 was the product of a legislative compromise. Neither the House version (less favorable to exit) nor the Senate version (permitting relatively easy exit) distinguished between carriers that received their authority before August 1, 1982, and carriers that received their authority after August 1, 1982. Both versions treated all carriers in the same way. The House version, although it provided that *any* (not just on pre-1982 routes) opponent could prevail on *either* the "public interest" *or* the "burden on interstate commerce" test, required the Commerce Commission to consider the factors now contained in (g)(2), (*i.e.*, national transportation policy, subsidy, alternative considerations) under both the "public interest" test and the "interstate commerce" test. House Report No. 334, 97th Cong., 1st Sess. 10-11, 43 (1981); House Conference Report, H.R. Rep. 780, 97th Cong., 2d Sess. 47-48, *reprinted in* 1982 U.S. Code Cong. & Ad.

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11. We suppose, however, that rarely will a court be able to determine such clear congressional intent contrary to the administrative construction from the shifting sands of legislative history, committee reports, and congressional debates in the enactment of legislation (as the present) that compromises conflicting interests, from which conflicting inferences may plausibly be drawn.

12. For instance, support can be found for *Pennsylvania Public Utility's* interpretation as to the determinative importance of the variable-cost-exceeds-revenue test in the senate committee report on its amendments to the House bill, which amendments first introduced the "variable costs" concept, see text *infra.* The Senate's amendments eased the carrier's exit requirements from those originally imposed by the House Bill. The report stated: "The exit policy of the Bus Regulatory Reform Act of 1982 is *grounded* on the *premise* that interstate carriers should be permitted to discontinue service *over routes that do not cover their variable costs.*" Senate Report No. 411, 97th Cong., 2d Sess. 25 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 2332 (emphasis added).

News 2358-59.[13] Nothing in the House version suggests that the Commission was to consider as determinative the relationship between variable costs and revenues. By contrast, the Senate version required the Commission to consider in every case both the relationship between variable costs and revenues and the factors now contained in (g)(2). Senate Report No. 411, 97th Cong., 2d Sess. 25-27 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad.News. 2332-34. It also required the Commission to grant a discontinuance request unless an objecting party proved that continuing the service would not constitute "an unreasonable burden on interstate commerce." *Senate Report, supra,* at 26, U.S. Code Cong. & Admin. News 1982, at 2333. Such a burden was said to exist "if discontinuance ... of the service [would not be] consistent with the public interest *and* the interstate and intrastate revenues from the service [would be] adequate to cover the variable costs of operating the service." *Id.* (Emphasis added.)

The compromise version, which was eventually enacted as § 10935(e), sought to reconcile the different emphasis given by the House and Senate as to the exit requirements. The Conference Report describes the compromise version in these terms:

> Same as House bill, except that (1) the Commission must give great weight to the extent to which the carrier's interstate and intrastate revenues on the route to be discontinued are less than the variable costs of providing the transportation on such route; (2) in the case of a route for which interstate authority is granted after August 1, 1982, the Commission shall grant a protested application for discontinuance of or reduction in intrastate service on such route, unless it finds that continuing the service will not constitute an unreasonable burden on interstate commerce; ... The exceptions specified in clauses (2) of the preceding sentence [is] the same as the Senate amendment.

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13. The House version also required the Commission to consider one factor that is not relevant here and that was not included in § 10935, since separate legislation was to be introduced as to it. *See House Report, supra,* at 11 ("whether granting [a discontinuance] petition will have a significant adverse effect on commuter bus operations").

Conference Report, supra, at 50, U.S. Code Cong. & Admin. News 1982, at 2361. From this description, as well as the legislative history as a whole, the Commission could reasonably infer that Congress intended for it to consider all of the factors in (g)(1) and (g)(2) in determining whether an objectng party has met its burden under both the "public interest" test and also the "interstate commerce" test of (e)(1)(A).

Contrary to what Texas suggests, the distinction between the burden of proof under (e)(1)(A) and the burden of proof under (e)(2)(A) is not eliminated by the Commission's construction. Under (e)(2)(A) (post-1982 authorizations), if an objecting party fails to prove that revenues exceed variable costs, the objecting party automatically loses. Under (e)(1)(A) (pre-1982 routes), if an objecting party fails in this regard, the objecting party might still prevail since the Commission need only accord "great weight" to the revenues/variable costs factor. The Commission might find, for example, that the elements enumerated in (g)(2) are not served by discontinuing services and that the public interest in maintaining the services outweighs the fact that revenues do not exceed variable costs. In such a case, the Commission is authorized by (e)(1)(A) to deny the carrier's application to discontinue the service.

Thus, even if we concede for present purposes that resort to legislative history was appropriate in this case to resolve a facial ambiguity contrary to the administrative resolution *(but see* note 11 *supra)*, the legislative history itself is ambiguous as to the proper construction to be accorded the statutory provisions in question. We defer, for reasons previously stated, to the Commission's permissible construction of them.

IV. Due Process

Texas raises a further due-process objection to the Commission's adoption of the present construction, contrary to an earlier construction by it that accords with that contended for by Texas. Texas contends, in particular, that the Commission acted impermissibly by adopting the new construction of §10935 in this case and by not offering a reasoned explanation for doing so. This contention must be evaluated in light of the following rule:

> An agency may change its policies in the course of a specific adjudication, and even apply those policies for the first time to the parties involved. The only restriction upon an agency's discretion to develop policy in this manner is that the agency must adequately explain its departure from the previous policy.

Missouri-Kansas-Texas Railroad Company v. United States, 632 F.2d 392, 409 (5th Cir. 1980) (citations omitted). *See also Western Coal, supra,* 719 F.2d at 778.

The construction of § 10935 the Commission adopted in this case is different from the construction the Commission had previously adopted in Petition of West Virginia Stage Lines, Inc. for Review of a Decision of the West Virginia Public Service Commission Pursuant to 49 U.S.C. 10935, Interstate Commerce Commission Decision No. MC-59238 (Sub-No. 74) (Sept. 9, 1984) ("*Virginia Stage Lines I*"). In *Virginia Stage Lines I,* the Commission construed § 10935 in the same way Texas urgues us to construe the statute here. As we pointed out in *Missouri-Kansas-Texas Railroad Company, supra,* however, the Commission is free to change its policy so long as the Commission adequately explains its reasons for doing so.

Texas correctly maintains that the Commission's original decision in this case contains no explanation for the change. Texas received such an explanation, however, when the state petitioned the Commission for a stay of the original decision pending judicial review. In denying the request for a stay, the Commission explained that § 10935, properly construed, requires consideration of all the factors enumerated in §§10935(g)(1) & (2) under both the "public interest" test and the "interstate commerce" test. Petition of Greyhound Lines, Inc. for Review of a Decision of the Railroad Commission of Texas Pursuant to 49 U.S.C. 10935, Interstate Commerce Commission Decision, No. MC-1515 (Sub-No. 343) at 5—7 (Feb. 28, 1984). Although "[t]he explanation might have been more complete ... we will 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.' " *Missouri-Kansas-Texas Railroad Company, supra,* 632 F.2d at 409, *quoting Bowman Transportation, Inc. v. Arkansas Best Freight System, Inc.,* 419 U.S. 281, 285-86, 95 S.Ct. 438, 441-42,

42 L.Ed.2d 447 (1974).[14] Such is the case here.[15]

V. Other Contentions

Texas also contends conclusorily that the Commission's decision is not support by substantial evidence and is arbitrary and capricious. For the most part, its argument in this regard is based upon its construction of the statutory provisions, which we have rejected. Despite Texas' additional contention to the contrary, we find that substantial evidence supports the Commission's determination that reasonable (rather than merely hypothetical) alternative service was available.

Without detailed explanation, we will simply state that—given its construction of the statute, to which we have deferred—the Commission's findings were supported by substantial evidence and were not arbitrary. "If the agency's findings are supported by substantial evidence and are not arbitrary or capricious, the reviewing court cannot reverse the findings of the agency on the basis that it would have decided

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14. It may be of interest that, several months after deciding *Virginia Stage Lines I,* the Commission reversed itself in Petition of Virginia Stage Lines, Inc. for Review of a Decision of the West Virginia Public Service Commission Pursuant to 49 U.S.C. § 10935, Interstate Commerce Commission Decision No. MC-59238 (Sub-No. 74) (March 1, 1984) ("*Virginia Stage Lines II*"). In doing so, the Commission stated that its earlier decision was based on "an inaccurate interpretation of the statute." *Id.* at 3. The construction the Commission Adopted in *Virginia Stage lines II* is identical to the construction the Commission adopted here. The Fourth Circuit subsequently upheld this construction in *Auville v. Interstate Commerce Commission,* 747 F.2d 179 (4th Cir. 1984).

15. Texas also suggested at one point that it was denied due process because the Commission's construction of § 10935 is unconstitutionally vague. We disagree. The "applicable standard for vagueness is the 'practical criterion of fair notice to those to whom the statute is directed. The particular context is all important' " *International Society for Krishna Consciousness of Houston, Inc. v. City of Houston, Texas* 689 F.2d 541, 553 (5th Cir. 1982), *quoting, American Communications Association v. Douds,* 339 U.S. 382, 412, 70 S.Ct. 674, 690, 94 L.Ed. 925 (1950). We think the statute provided Texas with fair notice of what the state had to show to meet its burden of proof under § 10935(e)(1)(A). Indeed, at oral argument, Texas acknowledged it would have introduced the same evidence regardless of which of the two constructions was adopted.

the case differently." *Home Health Services of the U.S., Inc. v. Schweiker,* 683 F.2d 353, 356-57 (11th Cir.1982); *see also Glazer Steel Corporation v. Interstate Commerce Commission,* 748 F.2d 1006, 1008 (5th Cir. 1984).

Conclusion

For the foregoing reasons, we AFFIRM the order of the Interstate Commerce Commission granting Greyhound's petition to discontinue bus service over one of the company's interstate routes between Houston and San Antonio and at twenty-six off-route points within the state of Texas.

AFFIRMED.

ALVIN B. RUBIN, Circuit Judge, concurring:

I join fully in this opinion without abandoning the views expressed in my dissent on the different question presented in *Western Coal Traffic League v. United States,* 719 F.2d 772, 780 (5th Cir.1983).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-4086

ICC Docket No. MC-1515 (Sub.-No. 343)

THE STATE OF TEXAS,

Petitioner,

versus

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Respondents.

Petition for Review of an Order of the
Interstate Commerce Commission

Before RUBIN, TATE, and HILL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of The State of Texas for review of an order of the Interstate Commerce Commission and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the Interstate Commerce Commission in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that petitioner pay to respondents and intervenor-respondent the costs on appeal, to be taxed by the Clerk of this Court.

April 4, 1985

RUBIN, Circuit Judge, concurring.

ISSUED AS MANDATE: April 26, 1985

APPENDIX C

INTERSTATE COMMERCE COMMISSION DECISION

No. MC-1515 (Sub-No. 343)

PETITION OF GREYHOUND LINES, INC. FOR REVIEW OF A DECISION OF THE RAILROAD COMMISSION OF TEXAS PURSUANT TO 49 U.S.C. 10935

Decided: December 12, 1983

By petition filed September 13, 1983, Greyhound Lines, Inc. (Greyhound or petitioner) seeks permission, pursuant to 49 U.S.C. 10935, to discontinue regular-route passenger service, as a motor common carrier, in intrastate commerce, over one route and to 46 service points located on nine other routes. Greyhound was recently denied permission to discontinue intrastate operations over the involved route and to the service points by the Railroad Commission of Texas (RCT). Objections to the petition have been filed by the RCT, United States Congressman Charles W. Stenholm, State Representative Steven A. Carriker and D.R. "Tom" Uher, the cities of Gonzales, Weimer, and Flatonia, TX and the County of Fayette, TX.[1] Greyhound filed rebuttal.

The petition is filed under Section 16 of the Bus Regulatory Reform Act of 1982, Pub. L. 97-261, 96 Stat. 1102, codified at 49 U.S.C. 10935 (Bus Act), which became effective November 19, 1982. Section 16 allows private bus operators to seek permission from this Commission to discontinue intrastate bus service over interstate routes (1) when they are denied such permission by the State regulatory body which would otherwise have jurisdiction or (2) when the State body fails to act on a discontinuance request within 120 days. The Commission's rules governing such petitions were adopted in Ex Parte No. MC-161, *Preemption of State Regulation - Regular Route Exit,*

1. In addition to the formal objection, letters opposing discontinuance of service were submitted by Ernest Mica, Mayor of the City of Flatonia, Mr. and Mrs. W. J. Miller, of Waelder, TX, Memorial Hospital of Gonzales, TX, and Mrs. M. D. Arthur of Flatonia, TX.

133 M.C.C. 20 (1982), and are codified at 49 CFR Part 1169.

Section 16 of the Bus Act requires the commission to grant a petition for discontinuance of intrastate service unless we find, on the basis of evidence submitted by persons objecting to the discontinuance, that such discontinuance is not consistent with the public interest or that continuing the transportation will not constitute an unreasonable burden on interstate commerce. In making this determination, the Commission is directed to accord great weight to the extent to which interstate and intrastate revenues derived from the involved service are less than the variable costs, including depreciation for revenue equipment, of providing the service. The petitioner has the burden of proving the amount of revenues and variable costs.[2] The Commission is further required to consider, to the extent applicable, at least (1) the national transportation policy of 49 U.S.C. 10101, (2) whether the petitioner has been offered or is receiving financial assistance to provide the transportation services at issue, and (3) whether the transportation is the last motor passenger carrier service available to points on the involved routes and whether a reasonable alternative to such service is available.

PRELIMINARY MATTER

RCT has filed a motion for oral argument. It excepts to Greyhound's allegations concerning the lack of impartiality of the RCT and would show at oral argument that these claims are without factual support, that impartiality is not an issue, and that statements concerning impartiality go beyond the limits of advocacy in proceedings before the Interstate Commerce Commission. RCT raises nothing that connot be resolved on the record before us and its motion is denied.

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2. These provisions apply to petitions involving routes overwhich the carrier was granted authority to provide interstate passenger transportation on or before August 1, 1982. The route and service points at issue in this proceeding all meet this criterion. Somewhat different and more liberal decisional standards apply to petitions involving routes for which interstate operating authority was granted after that day. Petitioner's interstate certificate embracing authority corresponding to operations to be discontinued, No. MC-1515 (Sub-No. 71), was issued October 27, 1982. However, this certificate merely supersedes petitioner's prior certificate, in which the route to be abandoned was granted and which was in existence prior to August 1, 1982.

BACKGROUND

On December 27, 1982, Greyhound filed an application with the RCT seeking permission to discontinue intrastate operations over one entire route between Houston and San Antonio (which involves service to 12 points)[3] and to 46 other service points located on nine other routes.

Hearings were held in Austin, Gonzales, Eagle Lake, Weimar, Flatonia, Anthony, Van Alstyne, and Merkel. A proposal for decision was issued on April 22, 1983. Exceptions were filed and a final order was issued on May 16, 1983 denying the requested discontinuance in their entirety. Greyhound's motion for rehearing was denied by order issued June 13, 1983.

RCT initially found that Greyhound failed to comply with new regulations it has adopted requiring service to any officials in any of the affected jurisdictions. To remedy this, the RCT itself served notice on mayors and county judges of the various jurisidictions.

RCT cited as reasons for denying the application the appearances in opposition by 235 witnesses who rely on Greyhound's service for medical services and for other purposes, and for shipments of medical and veterinary supplies and merchandise for businesses. Witnesses testified that Greyhound service is the only one available for the elderly and poor and dialysis and cancer patients.[4]

RCT described the evidence adduced by Greyhound as paltry. At the initial hearing an abstract of documents relating to costs was presented without the underlying documents. RCT found that although this abstract was accepted as part of the record at a later hearing, it was not admitted as evidence, and is not

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3. Kingsbury, Harwood, Belmont, Gonzales, Waelder, Flatonia, Engle, Weimar, Glidden, Alleyton, Eagle Lake, and East Bernard.

4. Although the RCT provides excerpts from the transcripts of the hearings, because a complete set of transcripts is not provided, it is impossible to determine the extent of public interest at individual points. It appears however that the vast majority of the testimony relates to the San Antonio-Houston route.

admissible under either Federal or Texas law. RCT found that Greyhound's witness could not explain how the abstract was prepared, could not qualify the underlying documents as business records, and could not identify any methodology used to separate variable costs from other costs. It also concluded that the cost evidence related only to the Houston-San Antonio route and that no cost evidence was provided for the other service points sought to be abandoned. RCT also found that no ridership information was presented and that Greyhound's revenue data was insufficient to justify exit from any of these routes.

Although Greyhound alleged that alternative service is available, RCT found that it did not show that such service is reasonable from the standpoint of routing or transit times. RCT also found that Greyhound did not show the extent to which it is experiencing competition or the extent to which the proposed discontinuance would enhance its competitive position.

For the above reasons, the RCT concluded that Greyhound failed to show that the public interest would be served by its proposed discontinuance or that continuation of service would be an unreasonable burden on interstate commerce. It also concluded that the evidence of record demonstrates a compelling public need for continuation of the service.

In its petition for review of the RCT decision, Greyhound asserts that the State decision exemplifies the type of burdensome regulation resulting in unreasonable discrimination against interstate commerce for which section 16 of the Bus Act provides a remedy. Greyhound states that it is seeking to rationalize, streamline and improve its route structure so as to provide the majority of its passengers with improved and better services. It states that it is suffering a significant loss over the Houston-San Antonio route sought to be discontinued and is inconveniencing its interstate and intrastate passengers by having to stop on the other nine routes at numerous service points where there is little or no traffic. It claims it filed its petition to discontinue the Texas service only after all other means of building up revenues over the route and at the service points had been exhausted.

Although an inconvenience may result to some passengers, Greyhound is of the opinion that the inconveniences will be minimal since there will be alternate Greyhound services available, in most instances, in close proximity to the points to be abandoned, it argues that the overall savings in time and fuel, and the resulting more efficient scheduling and better service will benefit the majority of Greyhound's passengers, especially those passengers which are now forced to subsidize its low revenue routes. Greyhound contends that if it is forced to continue operating the San Antonio-Houston route and to serve the other service points, and thereby incur additional losses, it will be compelled to seek higher rates on other routes to make up the losses. It considers this to be not only inequitable to other passengers, but also that it possibly could result in further diversion of its traffic to other transportation modes.

Greyhound emphasizes the extensive analysis of its Texas operations which resulted in its application to discontinue service over the San Antonio-Houston route and operations to the other service points.[5] It states it had been aware that for several years a number of its routes throughout its system had experienced low ridership levels, well below the level required to produce sufficient revenues to offset the cost of providing service. Its analysis of revenues and variable costs for the San Antonio-Houston route shows that in calendar year 1982 the route generated annual revenues of $161,531, that the variable costs attributable to that route were $178,814, and that variable costs exceeded reveneues by $17,282.

Greyhound's method for establishing its variable costs for the San Antonio-Houston route appears to have been to

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5. Greyhound's anaylsis of its operations to determine its low revenue route and points involved studies which it states were conducted in the ordinary course of its business. Greyhound's local supervisors rode its routes to determine the extent to which transportation services actually were being used and they prepared "schedule performance reports." Regular "bus ride reports," "bus observances," schedule registers, driver's "trip envelopes," average load reports, and "6-A" and "6-B" reports were studied. Greyhound also received evaluations and recommendations from its field personnel with respect to the operations of specific routes and schedules. Greyhound states that on the basis of these studies and reports, it was able to determine that for several years the involved route and service points had been generating less in revenues than the cost of providing the service.

establish, first, a cost figure for eight categories of variable expense[6] in terms of cents per mile. Once the appropriate cents-per-mile cost was established for each category, it then was multiplied by the miles operated over the route during the study year (156,950) to obtain the total variable expense dollars for each category. The sum of the eight category calculations provides the total variable expense for the San Antonio-Houston route.

The revenues earned on the route consist of package express and interstate and intrastate passenger revenues. The passenger revenues were calculated as follows:

First, Greyhound gathered data on the total annual ticket sales at locations where it has established commission agents. Ticket sales figures are reported by the agencies each month. Ticket sales for Gonzales, East Bernard and Eagle Lake amounted to $40,329 for 1982. Due to the city of Weimar's proximity to Schulenburg, a point at which service would remain, Greyhound concluded that Weimar agency sales would be retained and, therefore, it did not include them it its calculations.[7]

Second, Greyhound made a seven-day study of all the points on this route from driver's trip reports for the week ending January 21, 1983. The results showed $369.80 of inbound revenue to Flatonia, Weimar, Eagle Lake, Waelder, Gonzales, and Alleyton, and $737.81 outbound revenue generated from

6. 1. Maintenance (material, tire rental and services of buses.)
   2. Transportation (driver's wages and expenses, fuel and oil)
   3. Station and agency (commission paid agents)
   4. Traffic (tickets and baggage checks)
   5. Insurance and safety
   6. Administrative and general (employee welfare)
   7. Depreciation (buses)
   8. Taxes and licenses (fuel, social security, etc.)

7. Greyhound apparently also assumed that Flatonia agency sales would be retained, since Flatonia is also near Schulenburg. This was stated explicitly for express revenues. We are not able to infer why no ticket revenues were reported for Waelder as computer generated revenue data for agency locations is, apparently, available. There was also no attempt to quantify revenues for non-agency points, such as Alleyton (the only such point which had any traffic during the study week).

Flatonia, Weimar, Eagle Lake, Waelder, East Bernard, and Gonzales. The total revenues were $1,107.61. Petitioner then reviewed each ticket in the study to estimate the amount of traffic Greyhound would lose and retain as a result of discontinued service. According to Greyhound, of the $1,107.61, $620.60 would be lost and $487.01 would be retained. From the data Greyhound calculated an inbound-outbound ratio of 53.9 percent. This ratio is presumably based on the revenues expected to be retained after the discontinuance, but this is not clear from Greyhound's explanation. Petitioner then took the annual passenger sales figure of $40,329 from step 1 and applied the 53.9 percent ratio to it. This amounted to $21,735, and by adding the $40,329 annual revenue figure, petitioner determined total passenger revenues of $62,064.[8]

The express revenue was calculated by taking the total revenue derived from all inbound[9] shipments at Gonzales, East Bernard, Eagle Lake, and Waelder, four of six agency points on this route. This data was obtained from Greyhound's monthly agent reports, and amounted to $99,467. The express revenue for the other two agency points on this route, Flationia and Weimar, was not included in the express calculation because of their proximity to Greyhound's Schulenburg service route. The total passenger revenue figure of $62,064 was added to the express figure of $99,467 for total revenues of $161,531 for the San Antonio-Houston route.

Greyhound did not provide a revenue-variable costs comparison for the 46 service points which it seeks to abandon. Instead, it relies on a passenger count it conducted during the

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8. Despite its analysis which showed that $487.01 (or44%) of the $1,107.61 revenue during the study week would be retained, Greyhound evidently did not deduct this retained revenue from its annual passenger revenue estimate. This apparent error would produce an overstatement of passenger revenues of $27,289.

9. This figure actually appears to be all freight collections (for prepaid and collect shipments) at the agency stations, rather than inbound revenue. The agency reports submitted do not break down express collections between inbound and outbound. We are not able to ascertain this definitively because no report was submitted for Waelder and because it is not clear whether this figure was based on the same agency reports which were submitted in the record.

week ending January 21, 1983. Its study shows there were no passengers to or from 34 of the 46 service points during the study period. Of the other 12 points, only three had as many as four inbound or outbound passengers. Greyhound agencies are maintained at only six of the 46 points (Canutillo, Italy, Buda, Bremond, Farmersville, and Merkel). The remaining points are shown as flagstops on Greyhound's schedules. Greyhound states that it must travel from one to 16.5 additional miles off its routes in order to provide service to these points. It argues that 27 of the 46 points have alternate service available and 19 are located at distances ranging from less than one mile to 16.5 miles from the routes over which Greyhound is operating. It contends that elimination of these service points will enable it to provide a more competitive and expeditious service within Texas.

Petitioner is not receiving subsidies from any State, local or Federal entity with regard to providing service over the route to be discontinued or to the service points to be abandoned. The annual subsidy required by Greyhound to continue the service of the San Antonio-Houston route is $236,036. Greyhound offers to maintain service over the affected route and to the other service points if it receives revenues equal to its fully allocated costs plus 20 percent profit less any operating revenues generated by the service.

Greyhound points out that in addition to the alternate service already available at certain of the service points,[10] O.L. Brentz testified at the hearings that his bus company plans to offer service at Merkel, TX. Additionaly, since the conclusion of the hearings, American Bus Lines filed an application before the RCT to provide Texas intrastate service between San Antonio and Houston over routes that traverse East Bernard, Eagle Lake, Alleyton, Glidden, Weimar, Engle, Flatonia, Waelden, Gonzales, and Kinsbury, or practically all of the locations served on Greyhound's San Antonio-Houston route proposed to be abandoned. It argues that the market forces ap-

10. Greyhound provided a study both at the State hearing and with its petition setting out availability at the involved service points of alternative service from Trailways, Inc., Kerrville Bus Company, Inc., and Central Texas Trailways. It also submitted alternative service schedules from *Russell's Guide*.

pear to be operating in the way Congress intended, in that low-cost carriers with specialized service may enter marginal markets where higher cost carriers, such as Greyhound, are unable to generate a profit.

Greyhound argues that contrary to the RCT's findings in its decision, information was provided to the RCT staff and at the hearings concerning alternative transportation, variable costs and revenues, and on and off counts at each of the service locations to which Greyhound proposes to discontinue service. While it is Greyhound's contention that charter revenue is not material in this proceeding, it also provided that information at the RCT's request.

In its objection, the RCT states that the record demonstrates that the proposed discontinuances would not be in the public interest and that there is no substantial evidence from which to conclude that continuation of service would be an unreasonable burden on interstate commerce. We note, however, that RCT, not Greyhound, has the burden of proving that continuation would *not* be an unreasonable burden on interstate commerce.

RCT urges us to limit our scope of review in this case to the evidence which Greyhound presented in the State proceeding. Its position is that the Bus Act clearly intended for the State and representatives from affected points to participate meaningfully in the decision to remove service. It argues that Greyhound should not be allowed to ignore the State by presenting inadmissible and insubstantial evidence to the State and reserving the substance of its justification for presentation to this Commission.

RCT Argues that Greyhound did not present substantial admissible evidence of revenue and variable costs for the San Antonio-Houston route and that it presented no cost-revenue information for any of the other affected points. It contends that the information that Greyhound presented at the hearings is inadmissable because Greyhound's witness could not explain how the abstract of costs was prepared, could not qualify the underlying documents as business records, and could not identify any methodology used in separating variable

costs from other costs. RCT believes that Greyhound should have presented the documents which underlie the workpapers which were presented at the Gonzales hearing. It challenges the fact that Greyhound's variable cost evidence includes the cost of service between Houston and San Antonio rather than solely the cost of providing service to the intermediate points along the route. It believes that the per-mile variable cost should have been multiplied by the number of additional miles travelled to serve the intermediate points alone.

RCT also challenges Greyhound's revenue calculations. It excepts to Greyhound's interpretation of 49 CFR 1169.5(c) and its excluding revenues generated by service at San Antonio and Houston. It contends that this does not provide a complete picture of the total revenue generated by service to the intermediate points. It argues that while Greyhound presented evidence of revenues of passengers originating at intermediate points, it did not of passengers terminating at intermediate points. It also argues that Greyhound did not submit evidence of express revenues actually accrued at any of the 58 points. It contends that Greyhound submitted evidence of its system average express revenue per mile, but presented no evidence concerning whether express revenue at the involved points is greater or less than the system average.

RCT states that the only evidence which Greyhound presented for the service points to be discontinued was a passenger count during the week ending January 21, 1983. It notes that there is no allegation that this was a representative week or any explanation of how that week was selected for examination. It claims there is no way to determine what the total passenger loads were or how many passengers per trip are needed to cover variable or total costs. It argues that total ridership on the entire bus route must be examined to obtain a meaningful picture.

As to subsidies, the RCT contends that the statute does not give rise to any inference or presumption under Section 10935(e)(1) from the fact that no subsidy has been offered or received. It avers that in this situation Section 10935(g)(2)(3) is simply not applicable and considerations of this fact is not required.

RCT also states that although the evidence submitted shows that some alternative service to some of the involved points is available, Greyhound has not shown that it involves reasonable routing and transit times. RCT points out that American Bus Lines withdrew its application to provide service along the San Antonio-Houston route. It also argues that no evidence was presented to show the extent to which the discontinuances would improve Greyhound's transit times or otherwise improve Greyhound's competitive position.

In conclusion, the RCT submits that where the record shows a significant public need which can be met only by the service sought to be discontinued, and the extent to which Greyhound's variable costs may or may not exceed its revenues for involved service cannot be determined, the balance must be struck in favor of a finding with the proposed discontinuances would not be consistent with the public interest.

In his objection, Congressman Steinholm states that eight of the cities to which service is to be discontinued are within his district, including Merkel where a hearing was held. It is an agriculturally-based rural area which depends on bus service for veterinary services, and where 20 percent of his constituents are 62 or older. He stresses the loss of Greyhound's vital services to residents in business, agricultural, and health sectors.

The other objectors mainly point out the public need for the service, citing the hardships to various members of the public that use Greyhound's service. The cities of Gonzales, Weimar, and Flatonia note that 165 of the 235 public witnesses (70.2 percent of the total) were from those three cities. They point out that Greyhound will continue to make 16 trips daily between San Antonio and Houston (eight in each direction) through or in close proximity to these three cities and the nine other intermediate points located on that route. They argue that Greyhound does not propose to even maintain a flagstop at any of these points.

In rebuttal, Greyhound argues that objectors have seriously misjudged the modest nature of Greyhound's route restructuring in Texas. It states that it is seeking to discontinue service over a back road between Houston and San Antonio where an

eager entrepeneur is willing to provide service, and to 46 other "off route" points, the majority of which generate no revenue. It points out that Greyhound's documents were accepted into evidence at the State proceeding, and it presents the section of the transcript of the State proceeding which records their acceptance. It points out that the cost, revenue, and ridership evidence submitted here is the same which it presented to the RCT. That evidence sets out the material underlying Greyhound's revenue-variable cost analysis which was presented to the RCT, including documents prepared in the normal course of business, and it shows that Greyhound's methodology was also explained to the RCT. Greyhound explains that it did not present a revenue-cost statement for the "off route" points because it considered it would be overstating its cost if all miles and costs attributable to a particular trip would be assigned to the "off-route point" to be discontinued, particularly one with no sales.

Greyhound states that the RCT is wrong in its contention that overhead should be included in its revenue figure on the San Antonio-Houston route since overhead traffic will continue to be handled more expeditiously over Interstate Highway 10. It also notes that it provided agency sales data for each of its agency locations.

Greyhound argues that the lack of a subsidy here belies any claimed public interest in continuing low revenue service, and that the position of the RCT that Greyhound should continue to cross-subsidize the service has been rejected by enactment of the Bus Act.

Greyhound presents an affidavit from George F. Bain, the principal of American Bus Lines, stating that, subject to the discontinuance of service by Greyhound over the Houston-San Antonio route, he made a decision to institute passenger service over the route. On May 18, 1983, he filed with the RCT, for authority to transport passengers and their baggage over the following route:

> "From Houston over FM 1093 to its intersection with Hwy 60, thence over Hwy 60 to its intersection with Hwy 90A, thence over Hwy 90A to its intersection

with FM 102, thence over FM 102 to its intersection with Hwy 90, thence over Hwy 90 to its intersection with Hwy 97, thence over Hwy 97 to its intersection with Hwy 183, thence over Hwy 183 to its intersection with Hwy 90, thence over Hwy 90 to its intersection with FM 78, thence over FM 78 to San Antonio serving all intermediate points and vice versa."

Notice of the application was published by the RCT on July 15, 1983. Correspondence from counsel for Trailways, Inc. was received advising that the name that Mr. Bain had chosen was similar to that of a Trailways, Inc. subsidiary, American Bus Lines, Inc., and that use of that name would be confusing to the public and could result in "inadvertent regulatory misunderstandings" at the RCT. After this, Mr. Bain requested that the RCT dismiss his application on August 9, 1983. Mr. Bain expresses an intent to pursue his application and refile under a different name if Greyhound is permitted to discontinue service over the route. He states that he is experienced in the operation of a bus compnay, has the financial ability to do so, and has made arrangements with Trailways, Inc. for four buses.

DISCUSSION AND CONCLUSIONS

Based upon our consideration of the State record and decision and of the pleadings filed before us, we conclude that the request by petitioner Greyhound Lines, Inc. for permission to discontinue intrastate and interstate service over the San Antonio-Houston route should be granted. The request to discontinue service to the other service points should be granted where alternative service is available.

RCT complains that Greyhound did not comply with the notice requirements of the State. We find that this was cured by the State's providing the required notice.

RCT also urges us to limit our scope of review to the evidence which Greyhound presented in the State proceeding. RCT is correct in arguing that in enacting the Bus Act, Congress intended the State to have the opportunity to consider exit petitions in the first instance and have a role in the decision-

making process. However, Greyhound did not withhold any relevant evidence from the State. The verified statement and rebuttal reiterate material in the State record and contain argument pertinent to Federal standards. Also petitioner followed our rules for filing and submitting evidence, and opponents have had an opportunity to respond to its evidence. We note that while the RCT characterizes certain material as inadmissable, it was in fact admitted into evidence at the hearings. It is insufficient for the RCT merely to declare the cost-revenue study to be inadmissable when it had access to the data and could have required production of any other materials it needed for a staff study.

Turning to the merits of the case, we must grant permission to discontinue intrastate service unless we find that discontinuance is not consistent with the public interest or that continuing the transportation will not constitute an unreasonable burden on interstate commerce. In making this finding, we are to "accord great weight" to the extent to which interstate and intrastate revenues attributable to the service to be continued are less than the variable cost of providing the service.

SAN ANTONIO - HOUSTON ROUTE

Greyhound submits figures for 1982 which show variable costs exceeding revenues by a considerable margin over the San Antonio-Houston route. It has explained in detail its methods for calculating the variable cost figures. RCT has questioned the inclusion of the cost of through service between Houston and San Antonio in petitioner's calculation of variable costs. This was properly included since service over the entire route will be discontinued. We have reviewed Greyhound's determination of variable costs and find it to be a reasonable approximation that has not been adequately rebutted by objectors. In previous proceedings we have found allocation of variable costs on the basis of systemwide figures and per-mile costs to be acceptable absent convincing rebuttal. The expense accounts selected for allocation and the type of included expenses appear to be reasonable. While we believe generally that actual data is preferable, we recognize that the cost of developing it may not be justified if reasonable approximations can be relied upon.

Greyhound expects to continue transporting passengers to and from points beyond points on the route proposed to be abandoned because of its parallel and proximate services. Its decision not to include in its revenue figures intrastate and interstate revenues from through trips has not been shown to be an inaccurate interpretation of 49 CFR 1169.5(c), which provides that the revenue figure not include revenues which a carrier expects to receive in connection with services it will still operate. As stated in Ex Parte No. MC-161, *supra*, 132 M.C.C. 20, 26, if the effect of a discontinuance proposal is elimination of local service at intermediate points between two major cities, but retention of through service between those cities over interstate highways, the inclusion of "overhead" revenues would greatly distort the revenue and cost ratio, as they would not be related to the variable costs which the carier would save in discontinuing the local service.

We have a number of serious problems, however, with Greyhound's revenue figures for this route. Greyhound appears to have made a number of errors in estimating the revenues at issue. Errors which may underestimate the revenues at issue include the omission of passenger ticket sales at Waelder, Flatonia (unless we are to infer that Greyhound assumes Flatonia sales will continue at nearby Schulenburg), and all non-agency points on the route. Furthermore, the express revenue estimate appears to include only revenues *collected* at the four agency points (Greyhound explicitly assumes that Weimar and Flatonia express will be continued at nearby Schulenburg); this may not account for inbound prepaid shipments from these points. In addition, portions of Greyhound's explanation of its revenue methodology are less than clear, notably the derivation of its inbound-outbound ratio for passenger revenues. On the other hand, Greyhound apparently made at least one significant error in the opposite direction in failing to deduct the 44% of the affected passenger revenues which its one week traffic analysis indicated would be retained.

Our assessment of the likely magnitude of these several apparent errors is that their net effect is probably rather small: the passenger revenues from omitted points are apparently not large (the points, including Flatonia, had 8.3% of the passengers in the study week). The express revenue understatement may

be more substantial, but probably not enough to offset the apparent overstatement of passenger revenues. However, given the relatively small margin by which Greyhound's figures show revenues as falling short of variable costs (by only about 10%), the uncertainty introduced by the numerous apparent errors is great enough that we are not able to conclude that Greyhound has proved that its revenues are below its variable costs.

This does not, however, resolve the issue. Although revenues are not proven to be below variable cost, they are clearly below full economic cost, and, thus, continuation of this service would impose some burden on interstate commerce. Moreover, under the statute, protestant has the burden of proving that continuing the service would not constitute an undue burden on interstate commerce. While protestant has raised enough problems with Greyhound's revenue data to prevent a finding that Greyhound has met its burden of proving that variable costs exceeding revenue, it has not presented any evidence of its own to meet the "no undue burden" test. Accordingly, we must consider the other test specified in the statute: Whether the public interest supports continuation. This includes an analysis of the national transportation policy, whether a subsidy has been offered, and whether reasonable alternative service is available.

The goals of the national transportation policy require us to see that the needs of passengers and shippers are met and to provide for and maintain intrastate bus services and service to small communities and small shippers. Most of the evidence of a public interest in maintaining service came from cities on the San Antonio-Houston route, especially from Gonzales, Weimar, Flatonia, Eagle Lake, and Waelder.[11] Authorization of the discontinuances proposed by Greyhound will result in a cessation of passenger service to some points on the San Antonio-Houston route, which will cause hardships for individuals who now use this service and inconvenience for involved communities.

Greyhound is currently the only motor carrier of passengers serving certain of the points. Discontinuance will affect both passengers and package express service and will leave certain

11. There does not appear to have been any testimony from Harwood or Belmont.

communities without public passenger transportation. However, though the evidence as a general matter does show some impact from discontinuance, it does not establish that the public interest requires more than the service that would remain. It appears from the excerpts of the transcripts that the vast majority of witnesses are concerned with the loss of express service. A number acknowledge that alternatives are available, but at an increased cost. Package express service from carriers specializing in such service will still be available upon any discontinuance of Greyhound's service. It appears that, while Greyhound's express service may be preferred, competitors' services have not been fully tested.

Important in this analysis is the fact that there is an entrepreneur which is eager to begin service to all of the points which would lose Greyhound's service on that route except for Harwood and Belmont. Greyhound also has shown that Trailways serves Belmont and Gonzales on its Houston-San Antonio route.[12]

It is axiomatic that communities may lose service when a discontinuance is authorized and, consequently, the question is not simply whether losses of services will result, for then the provisions of the Bus Act would be rendered a virtual nullity. Rather, we must also consider the goals of allowing the most productive use of equipment and energy resources, enabling efficient and well-managed carriers to earn adequate profits and attract capital, and improving and maintaining a competitive privately owned motor carrier system. To that end, Greyhound should not be required to continue unprofitable operations which jeopardize its ability to provide service on its other routes in Texas and in other States by requiring cross-subsidization by successful operations. Consequently, the question requires a balance between the local interests in support of continuing the involved services against the policy of the Bus Act that favors exit from unprofitable routes and route rationalization.

One important goal of the National Transportation Policy is to "allow a variety of quality and price options to meet chang-

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12. Gonzales also has service available from Kerrvile Bus Lines, Inc. on an Austin-Cuero-Victoria-Corpus Christi route.

ing market demand and diverse requirements of the shipping and traveling public." Given the evidence that Greyhound has been able to come at least fairly close to covering its opportunity costs, and given the fact that Greyhound is a relatively high cost carrier, we believe it is likely that the smaller carrier proposing service here which may have lower operating costs may be able to provide service over this route profitably. If this should result, it will permit the various goals of the National Transportation Policy to be met simultaneously. Service would be maintained, the burden on interstate commerce would be ended, a variety of services would be provided which would be appropriate to the demands and requirements of this particular market, and equipment and energy resources would be used more productively and efficiently. Although it does not appear that Harwood has alternative service presently, or that it will have it in the immediate future, it is in close proximity to Luling which will continue to be served by Greyhound and there was no public testimony showing a need for service at this point.

In the Bus Act, Congress provided a mechanism by which States, local communities, or other entites could demonstrate that they have a concrete interest in maintaining unprofitable services. This mechanism is the offer of a subsidy. If an acceptable subsidy is offered, it is likely that the exit petition would be withdrawn or denied. Yet despite the importance the parties profess to place on Greyhound's services, no state, regional, or local authority has offered any amount of subsidy to Greyhound to maintain service over the San Antonio-Houston route.[13] Contrary to the assertions of the RCT, the absence of any such offer belies the claimed interest in maintaining the involved unprofitable services and makes it difficult for us to find that the public interest requires maintenance of the services. While we recognize that many factors enter into whether to offer a subsidy, we must, under the statute, take the lack of such an offer into consideration.

Also weighing in Greyhound's favor is that aspect of the public interest requiring elimination or reduction of cross-subsidies used to sustain local and intrastate services at the

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13. Because there are no offers, we need not consider petitioner's evidence on the amount of subsidy required to enable it to continue service.

expense of long haul and interstate passengers. Although Greyhound has not proven that its revenues are below variable cost, they are clearly below full cost, and thus the route is unprofitable. Greyhound's evidence of unprofitability indicates an attendant burden on interstate commerce created by the necessity of cross-subsidization. A strong showing of public need for continued service, if it were accompanied by evidence of an offer of a subsidy, might serve to mitigate the public interest impact of the unprofitability. However, the absence of a subsidy, the availability of other express service, the alternative of nearby service of Greyhound or other existing carriers, and the likelihood, based on the record, of new service willing to enter the market to replace the discontinued services, only serve to strengthen Greyhound's case. Consequently, we conclude that it has not been shown that discontinuance of Greyhound's service over the San Antonio-Houston route is not consistent with the public interest.

SERVICE POINTS ON OTHER ROUTES

Greyhound provided no variable cost information for these points. We reject its claim that any such data would overstate its costs. In other proceedings, appropriate incremental cost data has been developed. Nevertheless, there clearly is some added cost, and it could be approximated by using the cost figure developed for the San Antonio-Houston route (based largely on system average costs) of 114 cents per mile.

Agency point revenue data is, apparently, computer generated and could have been used, when combined with analysis of trip reports and tickets. It is possible that Greyhound chose not to perform a cost-revenue analysis because many of these points are only one mile (or less) from the routes and the incremental costs clearly would be minimal. In any case, Greyhound's failure to prove that costs exceed revenues does not resolve this case.

Greyhound offered a one-week passenger on-off count rather than developing specific dollar figures. RCT challenges it as unrepresentative. In other cases, we have expressed similar concerns. Other concrete evidence of losses in those cases, however, was sufficient to overcome possible errors in the one-week sam-

ple. Here there is no other evidence, although the study is acceptable and unrebutted to the extent it shows that for that week only 12 points generated any revenue.

While Greyhound has not satisfactorily proven that variable costs exceed revenues, it is RCT's burden to prove that continuing these services would not constitute an unreasonable burden on interstate commerce. It cannot meet this burden simply by challenging Greyhound's showing. It has an affirmative burden here which it has failed to meet.

Accordingly, we must look to the public interest test and the other factors we are directed in the Bus Act to consider. It is clear that Greyhound would operate more efficiently without serving these off-route points. It illustrates that, on one route, serving these points adds 55 minutes to the trip and, thus, impairs its ability to compete between major cities. There have also been no offers of subsidy and, contrary to RCT's claim, this fact must be considered as an indicium of the public interest. To the extent that full costs is not covered, Greyhound has no incentive to provide high quality service, and should not be required to subsidize these routes from its profitable operations.

On the other hand, RCT's analysis of the local public interest is entitled to weight, Greyhound has offered no evidence beyond its passenger study, and under the Bus Act we are specifically to consider the needs of small communities and whether the service is the last that is available.

Given this countervailing evidence, we believe that in these circumstances the deciding factor must be whether reasonable alternative service is available. The following discussion indicates our conclusion for each service point. We have attempted to balance the competing interests, and have focused on the impact on passengers, as opposed to express. Express service is available from many nationwide carriers and there is no specific evidence from protestants that is directed to a particularized need for express service that cannot otherwise be filled.

1. Dallas — Tulsa route: Melissa, Anna, Van Alstyne, and

Howe. Two witnesses appeared at the Van Alstyne hearing, one of which had not ridden the bus since June of 1980. All four cities are listed on Trailways' Kansas City-Tulsa-Dallas route as stops on the highway interchange if there are passengers. Greyhound has service available at Sherman and Mckinney which are less than 12 miles from all points except Van Alstyne. Since there is alternative service available and in view of the very limited public interest evidence presented by the RCT, we will grant Greyhound permission to discontinue service at these points.

2. Amarillo — Albuquerque route: Glen Rio. This point is listed as a flagstop on Trailways' Oklahoma City-Amarillo-Albuquerque route and we will grant Greyhound authority to discontinue service to this point.

3. El Paso — Las Cruces route: Anthony and Canutillo. At a hearing held in Anthony, a witness presented a petition from the residents of Canutillo and Anthony; however, the RCT did not provide the petition and we do not have information as to its contents or the number of signatures it contained. The mayors of Anthony and El Paso also testified. These points are listed as flagstops on Trailways' El Paso-Las Cruces route. We wil grant authority to discontinue service to these points in view of the alternative service available. Moreover, it is unclear from the record whether Greyhound still has this intrastate authority.

4. San Antonio — Corpus Christ route: Karnes City. Greyhound will continue to provide service at Kenedy, a point six miles from Karnes City; while, there is no evidence of any other available alternative service there appears no public interest and in view of the proximity of Karnes City and Kenedy, we will grant this discontinuance.

5. Houston — New Orleans Route: Sheldon, Crosby, and Vidor, Greyhound is offering service that is more than 12 miles away to Sheldon and Crosby. Vidor could be served from the closer point of Beaumont. There is no other service available to these points, Vidor had one passenger during the study week. Greyhound is denied permission to discontinue service to these points.

6. Dallas — Laredo route: DeSoto Junction, Lancaster, Sterrett, Forreston, Italy, Milford, Abbot, Elm Mott, Lorena, Bruceville/Eddy, Troy, Salado, Jarrell, Buda, and Kyle. Central Texas Trailways offers service to Lancaster, Sterrett, Forreston, Italy, Milford, Abbott, and Elm Mott on its Dallas-Waco route, DeSoto Junction is not listed on the Central Texas schedule, however, its population is listed as zero in Greyhound's appendix. Buda and Kyle are served by Trailways on its Dallas-San Antonio-McAllen-Brownsville route. Permission is granted to discontinue service to the above points. No alternate service information is provided by Greyhound as to Lorena, Bruceville/Eddy, Troy, Salado, or Jarrell and permission is denied to discontinue service to these points.

7. Waco — Houston route: Bremond, Greyhound offers service at Reagan, less than 12 miles from Bremond and Greyhound shows that Bremond is served by Trailways. Therefore, we will grant permission to discontinue service to this point.

8. Dallas — Memphis route: Wylie, Copeville, Farmersville, Campbell, Cumby, Cumby Junction, Brashear, and Saltillo. We have no evidence that there is any alternative service available to serve these points and both Farmersville and Wylie had passengers during the study week. Permission to discontinue service to them will be denied.

9. Dallas — El Paso route: Gordon Junction, Putnam, Clyde, Merkel, Trent, Roscoe, Loraine, Westbrook, Coahoma, Pyote, and Toyah. Trailways serves all of the points except Gordon Junction, Putnam, Pyote, and Toyah on its Dallas-El Paso-Los Angeles route. There was also testimony at the hearing that O. L. Brentz plans to offer serve to Merkel. Since no alternative service is available to Gordon Junction, Putnam, Pyote, and Toyah, three are more than 12 miles from other Greyhound service points and two had passengers during the one-week study, permission will be denied to discontinue service to these points.

Should Greyhound wish to pursue discontinuance at those points we have here denied that permission it may refile with the RCT, offering perhaps more substantial proof of revenues

and costs or a more representative passenger study. Affected communities may use this period to consider developing local, lower cost service or subsidy proposals.

Our decision here authorizes discontinuance of both interstate and intrastate operations over the San Antonio-Houston route in question and discontinuance to certain of the other service points discussed above. Greyhound has identified the portion of its Certificate No. MC-1515 (Sub-No. 71), authorizing interstate operations over the San Antonio-Houston route. Discontinuance can be effected by partial revocation of a portion of this certificate. Greyhound has not identified any of its other authority that may be pertinent here. We will not undertake the task of attempting to identify that authority or to reform the Sub-No. 71 authority to comport with Greyhound's proposal. Instead, Greyhound will be directed to describe specifically the modifications to its authority that will be consistent with this decision.

This decision will not significantly affect either the quality of the human environment or conservation of energy resources.

We find:

Persons objecting to the granting of permission to discontinue intrastate motor passenger transportation in this proceeding have not shown either that the discontinuance is not consistent with the public interest or that continuing the transportation, without the proposed discontinuance, will not constitute an unreasonable burden on interstate commerce. Permission should be granted to discontinue providing transportation as a motor common carrier of passengers in interstate or foreign commerce, and in intrastate commerce, over the San Antonio-Houston route involved in this proceeding. Greyhound also should be granted permission to discontinue service to the points set out in appendix B. In all other respects, Greyhound's petition should be denied.

It is ordered:

The motion of the RCT for oral argument is denied.

Greyhound Lines, Inc., is granted permission to discontinue providing transportation as a motor common carrier of passengers, in interstate or foreign commerce, and in intrastate commerce, over the San Antonio-Houston route involved in this proceeding, effective February 25, 1984, and to the service points set forth in appendix B effective immediately. In all other respects, Greyhound's petition is denied.

That portion of Certificate No. MC-1515 (Sub-No. 71), issued October 27, 1982, authorizing the interstate transportation to be discontinued, is revoked. The revocation will be effective concurrent with service discontinuances.

Greyhound Lines, Inc., should, within 60 days after the service date of this decision, submit a description of the modifications to its authority necessary to effect this decision, accompanied by a draft revised certificate (or portions of the certificate).

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison.

James H. Bayne
Acting Secretary

(SEAL)

APPENDIX A

SERVICE SOUGHT TO BE DISCONTINUED

The San Antonio-Houston route:

INTRASTATE AUTHORITY:
From San Antonio to Houston [Interstate Consolidated Motor Bus Certificate No. 1, Page 2 (Old Certificate 8)]

INTERSTATE AUTHORITY:
Between San Antonio and Houston:
From San Antonio over U.S. Highway 90 to junction Texas Farm Road 102, thence over Texas Farm Road 102 to Eagle Lake, thence over Alternate U.S. Highway 90 to Houston.
[Certificate No. MC-1515 (Sub-No. 71), Item No. 36, First Revised Sheet No. 60]

SERVICE POINTS SOUGHT TO BE ABANDONED

(1) Dallas - Tulsa route: Melissa, Anna, Van Alstyne, and Howe.

(2) Amarillo - Alburquerque route: Glen Rio.

(3) El Paso - Las Cruces route: Anthony and Canutillo.

(4) San Antonio - Corpus Christi route: Karnes City.

(5) Houston - New Orleans route: Sheldon, Crosby, and Vidor.

(6) Dallas - Laredo route: DeSoto Junction, Lancaster, Sterrett, Forreston, Italy, Milford, Abbott, Elm Mott, Lorena, Bruceville/Eddy Troy, Salado, Jarrell, Buda, and Kyle.

(7) Waco - Houston route: Bremond.

(8) Dallas - Memphis route: Wylie, Copeville, Farmersville, Campbell, Cumby, Cumby Junction, Brashear, and Saltillo.

(9) Dallas - El Paso route: Gordon Junction, Putnam, Clyde, Merkel, Trent, Roscoe, Loraine, Westbrook, Coahoma, Pynote, and Toyah.

APPENDIX B

SERVICE AUTHORIZED TO BE DISCONTINUED

The San Antonio - Houston route set forth in Appendix A.

SERVICE POINTS TO BE DISCONTINUED

(1) Dallas - Tulsa route: Melissa, Anna, Van Alstyne, and Howe.

(2) Amarillo - Albuquerque route: Glen Rio.

(3) El Paso - Las Cruces route: Anthony and Canutillo.

(4) San Antonio - Corpus Christi route: Karnes City.

(6) Dallas - Laredo route: Lancaster, Sterrett, Forreston, Italy, Milford, Abbott, Elm Mott, DeSoto Junction, Buda, and Kyle.

(7) Waco - Houston route: Bremond.

(9) Dallas - El Paso route: Clyde, Merkel, Trent, Roscoe, Loraine, Westbrook, and Coahoma.

APPENDIX D

49 § 10935. Discontinuing bus transportation in one State

(a) When a motor common carrier of passengers having intrastate authority under the laws of a State, and interstate authority under a certificate issued under section 10922 of this subchapter,[1] to provide transportation over any route to any point in such State has proposed to discontinue providing transportation over such route to such point or to reduce its level of service over such route to such point to a level which is less than one trip per day (excluding Saturdays and Sundays) and the carrier has requested the department, agency, or instrumentality of such State having jurisdiction over granting such discontinuance or reduction for permission to discontinue such intrastate transportation or to reduce its level of service to a level which is less than one trip per day (excluding Saturdays and Sundays) and the request has been denied (in whole or in part) or such department, agency, or instrumentality has not acted finally (in whole or in part) on the request by the 120th day after the carrier made the request, the carrier may petition the Commission for such permission.

(b) When a petition is filed under subsection (a) of this section, the carrier shall certify that he has notified (1) the Governor of the State in which such transportation is provided, (2) the State authority having jurisdiction over granting discontinuances of transportation by motor common carriers of passengers and reductions in levels of service by such carriers, (3) local governments having jurisdiction over areas which would be affected if such petition is granted, and (4) such other interested persons as the Commission may specify by regulation.

(c) Any person (including a department, agency, or instrumentality of a State or local government) may object to the Commission to the granting of permission to any motor common carrier of passengers to discontinue or reduce transportation under this section.

(d) If no person objects under subsection (c) of this section of the granting of permission to discontinue or reduce transportation under this section within 20 days after the carrier files

with the Commission the petition for such discontinuance or reduction, the Commission shall grant such permission at the end of such 20-day period.

(e)(1)(A) Subject to paragraph (3) of this subsection, if, within 20 days after a carrier files a petition for permission to discontinue providing intrastate transportation over any route to any point or to reduce its level of service over such route to such point to a level which is less than one trip per day (excluding Saturdays and Sundays), any person objects under subsection (c) of this section to the Commission to the granting of such permission, the Commission shall grant such permission unless the Commission finds, on the basis of evidence presented by the person objecting to the granting of such permission, that such discontinuance or reduction is not consistent with the public interest or that continuing the transportation, without the proposed discontinuance or reduction, will not constitute an unreasonable burden on interstate commerce.

(B) This paragraph shall apply to intrastate transportation of passengers which is being provided by a motor common carrier of passengers on a route over which such carrier was granted, on or before August 1, 1982, authority to provide interstate transportation of passengers.

(2)(A) Subject to paragraph (3) of this subsection, if, within 20 days after a carrier files a petition for permission to discontinue providing intrastate transportation over any route to any point or to reduce its level of service over such route to such point to a level which is less than one trip per day (excluding Saturdays and Sundays), any person objects under subsection (c) of this section to the granting of such permission, the Commission shall grant such permission unless the Commission finds, on the basis of evidence presented by the person objecting to the granting of such permission, that continuing the transportation, without the proposed discontinuance or reduction, will not constitute an unreasonable burden on interstate commerce. For the purposes of this paragraph, continuance of the transportation would not constitute an unreasonable burden on interstate commerce only if discontinuance or reduction of such transportation is not consistent with the public interest

and the interstate and intrastate revenues from such service under reasonable pricing practices are not less than the variable costs of providing the transportation proposed to be discontinued or reduced.

(B) This paragraph shall apply to intrastate transportation of passengers which is being provided by a motor common carrier of passengers on a route over which such carrier was granted after August 1, 1982, and before the effective date of this section, or is granted on or after such effective date, authority to provide interstate transportation of passengers.

(3) The Commission shall only grant permission to a carrier to discontinue intrastate transportation over any route to any point under this subsection if such carrier has applied for authority to discontinue its interstate transportation over such route to such point under section 10925(b) of this subchapter[1] and the Commission has granted or will grant such authority.

(4) If any person objects under subsection (c) of this section to the granting of permission to discontinue or reduce transportation under this section within 20 days after the carrier files with the Commission the petition for such discontinuance or reduction, the carrier, within 15 days after the filing of such objection with the Commission, shall furnish to the Commission and to objecting persons—

> (A) an estimate of the annual subsidy required, if any, to continue the service;
>
> (B) traffic, revenue, and other data necessary to determine the amount of annual financial assistance, if any, which would be required to continue the service; and
>
> (C) such other information as the Commission may require by regulation.

The Commission shall take final action upon such petition not later than 90 days after the date the carrier files such petition.

(f) Before a discontinuance or reduction in level of service pro-

posed in a petition filed by a carrier under subsection (a) of this section has become effective, the Commission may order the carrier to continue any part of the intrastate transportation in not to exceed the 165-day period beginning on the date the carrier files such petition with the Commission.

(g)(1) In making a finding under subsection (e)(1) of this section, the Commission shall accord great weight to the extent to which interstate and intrastate revenues received for providing the transporation proposed to be discontinued or reduced are less than the variable costs of providing such transportation, including depreciation for revenue equipment. For purposes of the preceding sentence, the carrier filing a petition for permission to discontinue or reduce service shall have the burden of proving the amount of the interstate and intrastate revenues received for providing the transportation and the variable costs of providing the transportation.

(2) In making a finding under subsection (e)(1) or (e)(2) of this section, the Commission shall consider, to the extent applicable, at least—

(A) the national transportation policy of section 10101 of this title;

(B) whether the motor common carrier of passengers has received an offer of, or is receiving, financial assistance to provide the transportation to be discontinued or reduced from a financially responsible person (including a governmental authority); and

(C) in the case of a petition to discontinue transportation to any point, whether the transportation is the last motor carrier of passenger service to such point and whether a reasonable alternative to such service is available.

(h) No State or political subdivision thereof and no interstate agency or other agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to discontinuance or reduction in the level of intrastate service by a motor com-

mon carrier of passengers subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title corresponding to an interstate service initiated pursuant to the provisions of section 10922(c)(4) of this title, except to the extent that notice of discontinuance or reduction in service, not in excess of 30 days, may be required.

(i) This section shall not apply to any carrier owned or controlled by a State or local government.

Added Pub.L. 97-261, § 16(a), Sept. 20, 1982, 96 Stat. 1115.

Public Law 97-261
97th Congress

An Act

To amend subtitle IV of title 49, United States Code, to provide for more effective regulation of motor carriers of passengers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That this Act may be cited as the "Bus Regulatory Reform Act of 1982".

PURPOSE OF THE ACT

SEC. 2. This Act is part of the continuing effort by Congress to reduce unnecessary and burdensome Government regulation.

CONGRESSIONAL FINDINGS

SEC. 3. The Congress hereby finds that a safe, sound, competitive, and fuel-efficient motor bus system contributes to the maintenance of a strong national economy and a strong national defense and is vital to the transportation needs of the elderly, handicapped, and the poor; that the statutes governing Federal regulation of the motor bus industry are outdated and must be revised to reflect the future transportation needs and realities; that historically the existing Federal and State regulatory structure has tended in certain circumstances to in

hibit market entry, carrier growth, maximum utilization of equipment and energy resources, and opportunities for minorities and others to enter the motor bus industry; that State regulation of the motor bus industry has, in certain circumstances, unreasonably burdened interstate commerce; that overly protective regulation has resulted in operating inefficiencies and diminished price and service competition in the motor bus industry; that the objectives contained in the national transportation policy can best be achieved through greater competition and reduced regulation: that in order to reduce the uncertainty felt by the Nation's motor bus industry and those persons and communities that rely on its services, the Interstate Commerce Commission should be given explicit direction for reduced regulation of the motor bus industry and should do everything within its power to promote competition in the motor bus industry; and that legislative and resulting changes should be implemented without unnecessary disruption to the transportation system consistent with the scope of the reforms enacted.

CONGRESSIONAL OVERSIGHT

SEC. 4. The appropriate authorizing committees of Congress shall conduct periodic oversight hearings on the effects of this legislation, not less than annually until July 1, 1985, to ensure that this Act is being implemented according to congressional intent and purpose.

Supreme Court, U.S.
FILED
AUG 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-9

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

THE STATE OF TEXAS,
Petitioner,
v.
UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, and
GREYHOUND LINES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT GREYHOUND LINES, INC.

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QUESTION PRESENTED

Whether the Fifth Circuit was correct when it ruled—in agreement with each of the other Circuits previously presented with the same question—that the Interstate Commerce Commission's interpretation of Section 16(g) of the Bus Regulatory Reform Act of 1982 is neither arbitrary nor capricious, but rather is a permissible reading of the Act by the expert agency charged with its implementation.

STATEMENT REQUIRED BY RULE 28.1

Respondent Greyhound Lines, Inc., is a wholly-owned subsidiary of The Greyhound Corporation. A list of the principal subsidiaries of The Greyhound Corporation and the subsidiaries and affiliates of Greyhound Lines, Inc., appears in an Appendix hereto.

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BRIEF IN OPPOSITION OF RESPONDENT GREYHOUND LINES, INC.

STATEMENT OF THE CASE

This case concerns a unanimous decision by the United States Court of Appeals for the Fifth Circuit (Rubin, Tate and Hill, JJ.) in which the court affirmed the granting by the Interstate Commerce Commission ("ICC" or the "Commission") of a petition by Respondent Greyhound Lines, Inc. ("Greyhound") to discontinue intrastate bus service over certain routes in Texas. The dispute began on December 17, 1982, when Greyhound filed a request pursuant to the provisions of the Bus Regulatory Reform Act of 1982 (the "Act" or "BRRA")[1] with the

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[1] Pub. L. No. 97-261, 96 Stat. 1102 (codified at 49 U.S.C. § 10935). *See* Pet. App. D-1 to D-5.

Railroad Commission of Texas ("RCT") to discontinue service over a single route between Houston and San Antonio and to 46 off-route "service points" on nine other routes in the State. Greyhound submitted economic data in support of its discontinuance request, and the RCT held a series of hearings around the State. The RCT hearing examiner ultimately issued a proposed decision denying Greyhound's application, to which Greyhound filed exceptions but which the RCT nevertheless adopted in a final order dated May 16, 1983. That final order denied Greyhound's discontinuance application completely; Greyhound's subsequent request to the RCT for a rehearing was likewise denied.

As contemplated under Section 16 of the BRRA, Greyhound then filed a petition with the ICC requesting permission to exit from the service that the RCT had refused to let Greyhound discontinue. Greyhound again supported its petition with data evidencing that its costs in providing the bus service over the route in issue exceeded the revenues earned from such service. Greyhound also submitted evidence that alternative bus service was available at or near all of the service points at which it sought to discontinue its own service.[2] Several parties, including the RCT, protested Greyhound's petition to the ICC; these protests were in turn rebutted by Greyhound. On December 12, 1983 the ICC, upon finding that "[p]ersons objecting to [Greyhound's application] have not shown either that the discontinuance is not consistent with the public

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[2] In point of fact, a new carrier has already received permission from the ICC to commence service between Houston and San Antonio, *see* I.C.C. Decision No. MC-171844 (February 1, 1984), and has in fact been in operation over that route since April 2, 1984. As a result, all but two of the service points previously served by Greyhound on its now-discontinued Houston-San Antonio route have received replacement bus service that traverses the same route. And even the two remaining off-route service points have sufficient alternate bus service available, either directly from other carriers or through a nearby town.

interest or that continuing the transportation, without the proposed discontinuance, will not constitute an unreasonable burden on interstate commerce" (Pet. App. C-23), granted Greyhound permission to discontinue service over the Houston-San Antonio route and to 26 of the 46 service points. As to the remaining off-route service points, however, the ICC found that sufficient alternate bus service was not available and therefore denied Greyhound's application to cease serving those communities.

Texas then filed a petition with the Fifth Circuit on February 8, 1984, seeking review of the ICC's partial granting of Greyhound's request.[3] In a unanimous decision issued on April 4, 1985,[4] the court affirmed the ICC's decision, finding the Commission's interpretation of the BRRA to be a permissible one (*see* Pet. App. A-9 to A-10), and the Commission's findings to be "supported by substantial evidence and * * * not arbitrary." Pet. App. A-15. The State of Texas now petitions this Court for a writ of certiorari.

REASONS FOR DENYING THE WRIT

Petitioner seeks review of but one narrow aspect of the Fifth Circuit's unanimous decision upholding the ICC's construction of provisions of the BRRA that by their very terms apply only to a limited class of discontinuance requests. Moreover, the Fifth Circuit's construction of the statutory provision at issue is in full accord with

---

[3] Texas also sought a stay of the ICC's decision from the Court of Appeals pending that court's review of the ICC's action. Texas' motion was denied by the court in an order dated March 5, 1985. Pursuant to the terms of the Commission's order, Greyhound has not offered the service here at issue for approximately a year and a half. *See* Pet. App. C-24.

[4] The court's opinion was authored by Judge Tate, in which Judge Hill unqualifiedly joined. Judge Rubin wrote a brief concurrence in which he stated that he, too, "join[ed] fully in this opinion." Pet. App. A-16.

both the plain language of the Act and the decisions of the three other Courts of Appeals that have been called upon to address the issue. Review by this Court of the Fifth Circuit's well-reasoned opinion, then, is simply not necessary, for the following specific reasons:

1. Petitioner does not even argue that this case raises great issues of national moment. Nor could it. The single legal issue presented by Texas' petition is a narrow one applicable only to a limited number of requests to discontinue bus service over older intrastate routes. As Petitioner itself concedes (Pet. at 3), this case is governed by Section 16(e)(1)(A) of the Act, which applies *only* to discontinuance requests involving routes for which the carrier received permission to commence service on or before August 1, 1982—three years ago. All routes granted after that date are governed by what Petitioner calls the "distinct provisions" in Section 16(e)(2)(A). Pet. at 7. Thus, over time, the importance of the statutory provisions under which this case arose will only diminish.

Indeed, while (as would be expected) a flurry of discontinuance requests for pre-1982 routes were filed before the ICC in the months immediately following passage of the BRRA's more liberalized exit procedures, the volume of such exit requests has since slowed to a trickle. Few, if any, of these more recent discontinuance petitions are likely to receive court review; indeed, only a mere handful of exit requests from among the initial wave of petitions were challenged in court, and Greyhound is aware of no other exit cases now in the courts which involve even remotely the issues decided below. Thus, the law relating to intrastate bus route discontinuances is not now a source of significant activity—let alone ferment—among the Circuits, and it is not likely to become one in the future. There is therefore no need for this Court to address the statutory provisions on which this petition is based.

2. That review of the Fifth Circuit's decision by this Court is unnecessary is further underscored by the fact that Petitioner contests but one limited aspect of that decision: the court's sustaining of the ICC's interpretation of Section 16(g)(1) of the BRRA, 49 U.S.C. § 10935(g)(1).[5] The Fifth Circuit ruled that the ICC properly construed Section 16(g)(1) to authorize the Commission to consider the carrier's cost/revenue data under *both* the "public interest" and "unreasonable burden" tests set forth in Section 16(e)(1)(A). *See* Pet. App. A-13. This holding fully comports with the decisions of the three other Circuit Courts that have dealt with exit provisions of the Act. *See Pennsylvania Public Utility Comm'n* v. *United States*, 749 F.2d 841, 848 & 851 (D.C. Cir. 1984) (*"PaPUC"*); *Auville* v. *Interstate Commerce Comm'n*, 747 F.2d 179, 185 (4th Cir. 1984); *Humphrey* v. *United States*, 745 F.2d 1166, 1168-69 (8th Cir. 1984). Thus, despite Petitioner's representations to the contrary, as to the *sole* issue upon which Petitioner seeks review by this Court, the Courts of Appeals are in complete accord that the ICC's interpretation of Section 16(g)(1) is correct.

3. Both the ICC and the court below were clearly correct in their interpretation of the Act. The pertinent part of Subsection (e)(1) of Section 16 sets up two criteria to be considered by the ICC—a "public interest" criterion and an "unreasonable burden" criterion. Subsection (g)(1) provides that the ICC is to assign great weight to cost/revenue data *under Subsection (e)(1)*—not under the "public interest" part of that subsection, or

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[5] Although Petitioner occasionally refers to Section 16(g)(2) in its petition, such references are for comparative purposes only; Petitioner does not appear to challenge the Fifth Circuit's analysis of Section 16(g)(2). Rather, the gravamen of Texas' petition is its objection to the ICC's having considered the economic data referenced in Section 16(g)(1) under both the "public interest" and "unreasonable burden" tests set forth in Section 16(e)(1)(A). *See* Pet. at 7 (arguing that "the public interest standard solely consist[s] of the three elements stated in § 10935(g)(2).")

under the "unreasonable burden" part of that subsection, but under Subsection (e)(1) itself.[6] Therefore, the ICC did precisely what the statute directed it to do and considered the cost/revenue data under both parts of the subsection. Petitioner would have this Court rewrite the Act to make it read: "In making a finding under the unreasonable burden criteria in Subsection (e)(1), the Commission shall accord great weight * * *." Congress *could* have written the statute in that fashion, but did not do so.[7] Neither should the courts. The Act's language, which is of course the ultimate measurement of Congressional intent, thoroughly supports the Fifth Circuit's holding and does not require further examination by this Court in order to be properly construed.[8]

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[6] "(g)(1) In making a finding under subsection (e)(1) of this section, the Commission shall accord great weight to the extent to which * * * revenues are less than * * * variable costs * * *."

[7] The Fifth Circuit indicated that it found Section 16(g)(1) to be "ambiguous" (Pet. App. A-7), despite its ultimate reliance on the plain language of the statute in upholding the ICC's decision. The perceived ambiguity flows from *part* of the Act's legislative history, for the Fifth Circuit undertook an examination of the House and Senate Reports to the BRRA, which offer explanations of bills substantially different not only from each other, but also from the BRRA as passed. However, the Conference Report for the BRRA, the only reliable legislative history, provides ample support for the interpretation of Section 16(g)(1) adopted by both the ICC and the courts. *See* Joint Explanatory Statement of the Committee of Conference, Bus Regulatory Reform Act of 1982, H.R. Rep. Conf. No. 780, 97th Cong., 2d Sess. 47-50 (1982). Hence, Section 16(g)(1) admits of only one interpretation—that given it by the ICC and the Circuit Courts—under both its plain terms and the relevant legislative history.

For the reasons just discussed, Petitioner's reliance on excerpts from the floor debate on the initial House version of the Act to support Petitioner's construction of Section 16(g)(1) (Pet. at 7) is likewise misplaced.

[8] *E.g., Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979).

4. In any event, the ICC's interpretation of the Act deserves the deference properly accorded to it by the Fifth Circuit. That is, even if one were to accept the proposition that Section 16(g)(1) is ambiguous by its terms—which we dispute—it is well settled that interpretations of statutes by administrative agencies charged with their implementation are entitled to deference by the courts. *E.g.*, *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council*, 104 S. Ct. 2778, 2781-2782 (1984); *Miller* v. *Youakim*, 440 U.S. 125, 145 n.25 (1979). Having found the ICC's construction of Section 16(g)(1) to be a reasonable and permissible one, the Court of Appeals quite correctly deferred to the Commission and affirmed its decision.[9]

5. Finally, the decision of the court below does not conflict with that of another Circuit. Petitioner's attempts to portray this case as in conflict with the District of Columbia Circuit's decision in the *PaPUC* case are simply inaccurate. As noted above, the *PaPUC* decision explicitly *agrees* with the Fifth Circuit's holding on the *only issue* on which Petitioner seeks review, the correct interpretation of Section 16(g)(1). While the court in *PaPUC* did reverse the ICC's grant of a discontinuance over one of twelve routes at issue in that case, the two principal grounds for reversing the ICC in the *PaPUC* case are not present here. First, there is no allegation that the Commission balanced the "public interest" stand-

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[9] Petitioner's contention that the Fifth Circuit's decision stands for the proposition that an agency interpretation of a statute that the reviewing court considers to be a "clear misread[ing]" of the Act must be deferred to (Pet. at 10) itself misreads the decision below. The Fifth Circuit nowhere in its opinion found the ICC's construction of Section 16(g)(1) to be a "misreading" of the statute; rather, the court found the Commission's interpretation to be a reasonable, permissible one. Hence, the court was not faced with an agency action representing a "clear misreading" of the relevant statute, and so did not address the issue of the proper scope of deference in such a circumstance.

ard *against* the "unreasonable burden" standard under Section 16(e)(1)(A), as the court found it to have done in *PaPUC*. Quite to the contrary, the ICC in this case on several occasions in its decision explicitly and affirmatively found that Petitioner had failed to meet its burden of establishing that *either* of Section 16(e)(1)(A)'s tests for denying an exit request had been met. *E.g.*, Pet. App. at C-2, C-14, C-23.[10]

Second, the court in the *PaPUC* case chastised the ICC for permitting discontinuance based on the mere hypothetical possibility that replacement service might become available to the affected communities. Here, in telling contrast, the Commission explicitly found alternate service either to exist or to have been granted formal permission to commence operations. Pet. App. C-17; C-20 to C-22.[11] In fact, the ICC in the instant case *denied* a large number of Greyhound's requested discontinuances to service points where alternate service was not available. Pet. App. C-21 to C-22. Hence, this second ground for reversal in *PaPUC* is also absent here. There is, therefore, no conflict between the decision below and the decision of any other Circuit Court.

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[10] The Commission did "balance" the numerous factors identified in Section 16(g) of the Act as matters to be considered in making the "public interest" inquiry required under Section 16(e)(1)(A). Pet. App. at C-20. The appropriateness—indeed, the necessity—of such balancing to achieve a public interest determination is not directly disputed by Petitioner; rather, Petitioner characterizes this instance of balancing as "exactly the type of decisionmaking" at issue in the *PaPUC* case. Pet. at 10. As we have shown in the text, however, this assertion is patently incorrect, for the *PaPUC* case involved balancing of the public interest determination *against* the unreasonable burden determination, not balancing of prescribed statutory standards to make a public interest determination in the first place.

[11] As noted *supra* (n. 2), such alternative service has already begun over the main route involved in this case and to most of the service points on that route.

For all of the foregoing reasons, Judges Rubin, Tate and Hill correctly upheld the ICC's decision in this case. Their opinion is in full accord with the plain terms of the BRRA, its legislative history, and the decisions of the other Circuits. This fact, when combined with the very narrow scope of the issue presented for review by Petitioner, renders this petition one that this Court may, and should, readily deny.

Respectfully submitted,

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APPENDIX

LIST OF PRINCIPAL SUBSIDIARIES OF THE GREYHOUND CORPORATION (ARIZONA) AND SUBSIDIARIES AND AFFILIATES OF GREYHOUND LINES, INC. (CALIFORNIA)

Parent-subsidiary or affiliate relationships are shown by marginal indentation. State, province or country of incorporation and ownership percentage are shown in parentheses following each name, except that no ownership percentage appears for 100 percent owned subsidiaries. If ownership is divided between two affiliates, the ownership percentage of both is combined and is not in parentheses, and in such cases the company is listed as a subsidiary or affiliate of the company holding the highest percentage of stock. The list does not include companies in which the direct or indirect interest of The Greyhound Corporation is less than 20 percent.

THE GREYHOUND CORPORATION (ARIZONA)

(PARENT)

TRANSPORTATION GROUP

GREYHOUND LINES, INC. (California)

Greyhound Bus Depot of Atlanta, Inc. (Georgia) (87%)
Greyhound Lines of Canada Ltd. (Canada) (68%)
Motor Coach Industries Limited (Manitoba) (68%)*
Greyhound-Taseco Saudi Arabia Ltd. (Saudi Arabia) (40%)
Jefferson Lines Holding Company (Minnesota) (40%)
Kerrville Bus Company, Inc. (Texas) (40%)

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* Motor Coach Industries is a part of the Transportation Manufacturing Group, but is a subsidiary of Greyhound Lines, Inc.

Southeastern Stages, Inc. (Georgia) (40%)
Springfield Bus Terminal Corporation
(Massachusetts) (32%)
Union Bus Station of Oklahoma City, Oklahoma
(Oklahoma) (20%)
Wilmington Union Bus Station Corporation
(North Carolina) (25%)
Texas, New Mexico & Oklahoma Coaches, Inc.
(Texas) (98%)

TRANSPORTATION MANUFACTURING GROUP

Motor Coach Industries, Inc. (Delaware)
Transportation Manufacturing Corporation (Delaware)
Universal Coach Parts, Inc. (Delaware)

CONSUMER PRODUCTS GROUP

Armour-Dial, Inc. (Delaware)
Armour Handcrafts, Inc. (Arizona)
Armour International Company (Arizona)
Purex Corporation (Delaware)

FINANCIAL GROUP

Greyhound Computer Corporation (New York)
Greyhound Financial & Leasing Corporation AG
(Switzerland)
Greyhound Leasing & Financial Corporation (Delaware)
Greyhound Realty Corporation (Arizona)
MCI Acceptance Corp. (Delaware)
Verex Corporation (Arizona)

SERVICES AND FOOD SERVICE GROUP

Aircraft Service International, Inc. (Delaware)
Consultants & Designers Inc. (Delaware)
Dispatch Services, Inc. (Florida)
Faber Enterprises, Inc. (Delaware)
Florida Export Tobacco Co. Inc. (Florida)

Greyhound Exhibitgroup Inc. (Delaware)
Greyhound Exposition Services, Inc. (Nevada)
Greyhound Food Management, Inc. (Michigan)
    Glacier Park, Inc. (Arizona) (80%)
    Restaura, S.A. (Belgium)
Greyhound Support Services, Inc. (Delaware)
Post Houses, Inc. (Delaware)
Premier Cruise Lines, Ltd. (Cayman Islands)
Travelers Express Company, Inc. (Minnesota)

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No. 85-9

In the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF TEXAS, PETITIONER

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, in deciding if a bus line may be discontinued under 49 U.S.C. 10935(e)(1)(A), the Interstate Commerce Commission may consider the evidentiary criteria in 49 U.S.C. 10935(g)(1) and (2) in both its "public interest" and "unreasonable burden" determinations.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 756 F.2d 419. The decision of the Interstate Commerce Commission (ICC) (Pet. App. C1-C26) is unreported. A subsequent (February 28, 1984) decision of the ICC denying Texas's request for an administrative stay of the ICC's decision pending review in the court of appeals is also unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1-B2) was entered on April 4, 1985. The petition for a writ of certiorari was filed on July 3, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenges the Interstate Commerce Commission's grant of the request by Greyhound Lines, Inc. (Greyhound), for permission to discontinue bus service to a series of points in Texas.

1. In Section 16(a) of the Bus Regulatory Reform Act of 1982 (Bus Act), 49 U.S.C. 10935, Congress authorized the Interstate Commerce Commission (ICC) to preempt state regulation of certain bus carrier requests to discontinue intrastate bus services. Congress was concerned that state regulation had contributed to the inadequate performance of the bus industry in recent years and believed, in particular, that state regulation often created impediments that prevented interstate carriers from abandoning unproductive routes. S. Rep. 97-411, 97th Cong., 2d Sess. 7-11, 25-27 (1982); H.R. Rep. 97-334, 97th Cong., 1st Sess. 24-27 (1981); see *Humphrey* v. *United States*, 745 F.2d 1166, 1168 (8th Cir. 1984).

To remedy the burdensome effect of state regulation, Section 10935 gives the Commission final authority over interstate carriers' requests to discontinue intrastate bus service.[1] That provision limits state authority to review the exit petitions of interstate carriers providing intrastate transportation to a 120-day period. The ICC obtains jurisdiction if the state denies the request (in whole or in part) or fails to decide the request within 120 days. 49 U.S.C. 10935(a). Once the Commission obtains jurisdiction, it "shall" grant the request for discontinuance unless a timely objection is filed and the objecting party proves that discontinuance of the service "is not consistent with the public

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[1]Before the Bus Act reforms, states had full authority to regulate the commencement and discontinuance of intrastate bus service by interstate carriers. States retain full authority over exit petitions from bus carriers owned or controlled by a state or local government and from solely intrastate carriers.

interest or that continuing the transportation * * * will not constitute an unreasonable burden on interstate commerce." *Id.* at 10935(e)(1)(A).[2]

The terms "public interest" and "unreasonable burden on interstate commerce" are not defined in Subsection (e)(1). Congress, however, specified certain factors the ICC must consider in deciding whether to allow intrastate service to end. First, 49 U.S.C. 10935(g)(1) provides that in making a finding under Subsection (e)(1) the Commission "shall accord great weight" to the extent to which the revenues exceed the variable costs of providing the service. Second, 49 U.S.C. 10935(g)(2) directs the ICC to "consider, to the extent applicable, at least": "the national transportation policy" set forth in *id.* at 10101; whether the carrier has received an offer of financial assistance from a responsible person (including a governmental authority) to subsidize the service; and whether the carrier discontinuing service is the last one to provide it and whether reasonable alternative service is available.

The dispute in this case is over whether the statutory evidentiary factors discussed in the preceding paragraph are relevant under both the "unreasonable burden" and "public interest" tests.

2. Greyhound decided it wished to discontinue intrastate service over one of its interstate routes between Houston and San Antonio and to 46 off-route points served by nine other interstate routes in Texas. In May 1983, the Railroad Commission of Texas (RCT) denied Greyhound's request entirely (Pet. App. C3). Greyhound's subsequent appeal for a rehearing was denied that June (*ibid.*).

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[2]This standard applies to any intrastate service on an interstate route for which the carrier received operating authority on or before August 1, 1982 (49 U.S.C. 10935(e)(1)(B))—that is, before the reforms of the Bus Act. All of the routes at issue precede that date.

Greyhound then appealed the RCT decision to the ICC. After considering the evidentiary record before the RCT, the RCT's decision, and the pleadings and evidence submitted to the Commission itself, the Commission decided that Greyhound should be allowed to discontinue service at all points on the Houston-San Antonio route and at 26 of the 46 off-route points (Pet. App. A1, C13-C26). In reaching this decision, the ICC made distinct and separate findings under both the "unreasonable burden" and "public interest" tests (see, *e.g.*, *id.* at C16).

The Commission first examined the interstate burden imposed by this service. It considered Greyhound's evidence that the Houston-San Antonio route was unprofitable[3] and that ridership levels to all the points involved were low (Pet. App. C5-C8, C14-C16, C[illegible]-C20). RCT challenged Greyhound's cost and revenue data, but did "not present[] any evidence of its own" to support a finding that continued service at these points would not constitute an unreasonable burden (*id.* at C16). On the record before it, the Commission concluded that the RCT had failed to carry its burden of proving that Greyhound's service would not constitute an unreasonable burden on interstate commerce (Pet. App. C16, C20).

The Commission then turned to the public interest test (Pet. App. C16, C20). It considered the public testimony of need for bus service, the availability of alternative bus service in the affected communities, the unprofitability of

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[3] Greyhound offered variable cost and revenue calculations for the Houston-San Antonio route which it claimed established that revenues for that route were 10 percent below its variable costs. Due to errors in the calculations, the net effect of which was "probably rather small," the Commission could not be certain that Greyhound's revenues actually were below the variable costs of service (Pet. App. C15-C16). Nevertheless, the agency was convinced that Greyhound's revenues were below full cost, so that the services were unprofitable (Pet. App. C19).

Greyhound's service to these points,[4] and the absence of a subsidy offer (*id.* at C16-C19, C20-C22). The Commission's decision ultimately hinged on the availability of reasonable alternative service. The Commission granted Greyhound's petition to discontinue service only to those points that either had no riders or would have alternative service (*id.* at C19, C20-C22).

The petitioner, on behalf of the RCT, then sought judicial review in the United States Court of Appeals for the Fifth Circuit.

3. The court of appeals upheld the Commission's decision in all respects (Pet. App. A1-A16). The court rejected petitioner's principal argument that revenue and cost evidence submitted under Subsection (g)(1) may be considered only for the unreasonable burden test, and that the Subsection (g)(2) factors apply only to the public interest test. Instead, the court upheld the Commission's interpretation that, while the public interest and unreasonable burden

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[4]The Commission examined the public interest impact of unprofitability in terms of the national transportation policy (NTP) (see 49 U.S.C. 10101(a)(2)). As the Commission explained, the NTP articulates policy goals of, inter alia, allowing the most productive use of equipment and energy resources, enabling efficient and well-managed carriers to earn adequate profits and attract capital, and improving and maintaining a competitive, privately-owned motor carrier system (Pet. App. C17-C19). The Commission reasoned that to the extent Greyhound's unprofitability jeopardized its ability to provide service on its other routes or forced passengers on profitable routes to subsidize the service at issue by paying higher rates, Greyhound's unprofitability had a public interest impact that properly could be considered under the public interest test; it also pointed out that having services profitably provided by the smaller carrier stepping into Greyhound's shoes here would "permit the various goals of the National Transportation Policy to be met simultaneously. Service would be maintained, the burden on interstate commerce would be ended, a variety of services would be provided which would be appropriate to the demands and requirements of this particular market, and equipment and energy resources would be used more productively and efficiently" (Pet. App. C18).

tests are distinct, the evidence outlined in Subsections (g)(1) and (g)(2) may be relevant to both tests. Although the court viewed both the statute's language and its legislative history as ambiguous, it concluded that the Commission's interpretation was a permissible one (Pet. App. A8-A13).

More specifically, the court noted that the statutory language does not "require that exclusive weight be given" to the variable costs factor under the "public interest" or "interstate burden" inquiries (Pet. App. A8). The court observed (*ibid.*) that instead Subsection (g)(1) provides that "the Commission 'shall accord *great weight*' (only) to the variable costs factor in making a finding under (e)(1) — which finding would include application of both tests ('public interest' and 'interstate burden')" (emphasis in original; citation omitted). Similarly, the court found that Subsection (g)(2) "provides that '[i]n making *a* finding' under [Subsection (e)(1)] * * *, the Commission shall consider the national transportation policy, the offer or receipt of a subsidy, and the availability of alternative services" (*ibid.*) (emphasis in original; footnote omitted).

Given the reasonableness of the Commission's interpretation of the statutory language, the court of appeals questioned whether consideration of the legislative history was even appropriate in light of this Court's decision in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 4-7 (Pet. App. A9-A11). Nonetheless, turning to the legislative history arguendo, the court noted that under the House version of the Act, which was ultimately adopted in Subsection (e)(1), the Commission could reasonably infer that it is required to consider all of the current Subsection (g)(1) and (g)(2) factors under both the unreasonable burden and public interest tests (Pet. App. A11-A13). The court also concluded that, "[c]ontrary to what Texas suggests, the distinction between the burden of proof under (e)(1)(A) and the burden

of proof under (e)(2)(A) is not eliminated under the Commission's construction," since an objecting party who failed to prove that revenues exceed variable costs automatically loses under the latter, but not the former (*id.* at A13). The court concluded that the Commission's interpretation of the statute was a reasonable one in light of the statute's legislative history, as well as its language (*ibid.*).[5]

ARGUMENT

The opinion of the court of appeals correctly affirmed the Interstate Commerce Commission's interpretation of the Bus Act. The holding is consistent with the statute and with the decisions of three other courts of appeals that have reviewed ICC exit decisions under the Bus Act; it does not conflict with any decision of this Court or any other court. Moreover, the petition raises no issues of general importance. Further review by this Court is not merited.

1. Petitioner's principal contention is that the court of appeals' decision eliminated any distinction between the unreasonable burden and public interest tests by allowing the Commission to consider some of the same evidentiary factors under both tests.[6] Petitioner maintains that the only way to preserve the statutory mandate for separate tests is

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[5]The court of appeals also rejected petitioner's other arguments, holding that the Commission's decision did not deny petitioner due process; that it was supported by substantial evidence and was not arbitrary or capricious; and that the Bus Act is not unconstitutionally vague (Pet. App. A13-A16). Petitioner does not press these arguments to this Court.

[6]The petitioner continually mischaracterizes the position taken by the Commission and the court of appeals. Both clearly acknowledged that Subsection (e)(1) contains two separate and distinct tests. They simply rejected the argument advanced by petitioner here that the unreasonable burden test is limited to a simple comparison of revenues and variable costs and that the public interest test cannot include economic considerations.

to ensure that completely different evidentiary factors apply to each test. Thus, petitioner argues, the Commission may consider only the Subsection (g)(1) revenue and variable cost data under the unreasonable burden test (Pet. 5), and may consider the Subsection (g)(2) factors only under the public interest test (Pet. 7, 8). Petitioner's argument is logically and legally deficient.

The court of appeals was correct that the Commission's construction of this broad-textured statute should be deferred to so long as it is a reasonable one, *Chevron, supra*, slip op. 4-7. On its face, the statute does not restrict the Commission's consideration of the Subsection (g)(1) and (g)(2) evidentiary factors to one test or the other. It would have been a simple matter for the statute to have provided that Subsection (g)(1) controlled the undue burden determination and Subsection (g)(2) the public interest determination, but Congress did not write it that way. The legislative history, if ambiguous, nonetheless includes ample support for the Commission's approach, as the court of appeals concluded (Pet. App. A10-A13). The District of Columbia Circuit agreed, finding that "Representative Clausen's description of the conference bill [ultimately passed] lends support to [the Commission's] interpretation:

> The conference substitute also provides that in making its public interest and burden-on-commerce determinations, with respect to reduction or continuance of existing service, the Commission shall give great weight to the extent to which the revenues derived from the service in question are less than the variable costs of providing the service.

128 Cong. Rec. H6695 (daily ed. Aug. 19, 1982)." *Pennsylvania Public Utility Commission* v. *United States*, 749 F.2d 841, 851 (D.C. Cir. 1984).

The construction of the statute upheld here fully comports with the decisions of the other circuits that have reviewed cases decided under Section 10935(e)(1). No court has held that all the Subsection (g)(2) evidentiary factors are relevant only under the public interest test. Moreover, two other courts of appeals have specifically rejected petitioner's argument that Subsection (g)(1) applies solely to the unreasonable burden test. *Pennsylvania Public Utility Commission* v. *United States*, 749 F.2d at 847-853 (ICC may consider variable cost factor in making both of the required findings)[7]; *Auville* v. *ICC*, 747 F.2d 179, 185 (4th Cir. 1984) (Subsection (g)(1) makes financial loss a factor in each of the two Subsection (e)(1)(A) determinations). See also *Humphrey* v. *United States*, 745 F.2d 1166 (8th Cir. 1984) (upholding a Commission decision that apparently weighed unprofitability under both tests).

The Commission's decision in this case illustrates the fallacy of petitioner's claim that the ICC's interpretation of the statute eliminates any distinction between the two tests. If only the unreasonable burden test had been applied, the Commission would have authorized discontinuance to *all* off-route points, since the RCT had not shown that service at these points would not unreasonably burden interstate commerce. But, by applying the public interest test, the Commission denied discontinuance for the 20 active points that would have no alternative service. Even though some of the same evidence may be considered under both tests, the Commission's evaluation and use of the evidence is demonstrably not for the same purpose. There is no reason to suppose that the Commission is incapable of deciding how a datum relates to the presence of public interest, on the one hand, and how it relates to an undue burden on interstate commerce, on the other.

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[7]The purported "conflict" between *Pennsylvania* and this case is discussed in greater detail at pages 11-12, *infra*.

Economic impacts simply cannot be divorced from, and ignored in, a public interest analysis. For example, the statutory "national transportation policy" (which petitioner concedes is applicable under the public interest test) directs the Commission to economic, as well as other, considerations. Specifically, under 49 U.S.C. 10101(a)(2)(C), (D), and (G), pertinent public interest concerns include whether the service sought to be discontinued represents a productive use of the carrier's equipment and resources, the carrier's ability to generate adequate revenues, and the maintenance of a "sound, safe, and competitive privately owned motor carrier system." Similarly, evidence that the carrier has been offered a subsidy (Subsection (g)(2)(B)) is an indicium of the public's interest in maintaining service, as petitioner would concede, but it is also clearly a relevant consideration in determining whether continued operation will actually burden interstate commerce. The Commission should be able to consider it in both instances. And, again, if there is to be a presumption ("great weight") in favor of discontinuance when a carrier demonstrates that variable costs substantially exceed revenues—see H.R. Conf. Rep. 97-780, 97th Cong., 2d Sess. 49-50 (1982); 128 Cong. Rec. H6694-H6695 (daily ed. Aug. 19, 1982) (statement of Rep. Clausen); *Pennsylvania, supra*, 749 F.2d at 847-848—then Subsection (g)(1), at least, will necessarily have to be considered in both determinations.

Finally, contrary to the petition's assertion (at 7-8), the Commission's construction of the Act does not eliminate the distinction between the pre- and post-August 1982 bus exit standards. As the court of appeals explained, under Subsection (e)(2)(A) (which governs post-August 1982 routes), if the carrier's revenues are less than its variable costs, the Commission cannot disapprove the discontinuance. In contrast, under Subsection (e)(1)(A) (pre-August 1982 routes), the objecting party might still prevail since the

Commission need only accord "great weight," not conclusive weight, to the revenues/variable cost showing. See Pet. App. A13; see also *Humphrey* v. *United States*, 745 F.2d at 1169 n.4.

Thus, the court of appeals properly held that the Commission's interpretation of the Bus Act—that the evidentiary factors in Subsections (g)(1) and (g)(2) are relevant to both tests—was reasonable.

2. Petitioner mischaracterizes the decisions of both the Fifth Circuit and the District of Columbia Circuit in an attempt to create a conflict between them.[8]

In *Pennsylvania*, the District of Columbia Circuit held that (1) the ICC may accord the fact that variable costs exceed revenues "great weight" in its public interest and its unreasonable burden findings, but that (2) the public interest and unreasonable burden determinations themselves may not be balanced against one another, but must each be considered separately. Thus, with regard to the first holding, the opinion specifically rejects petitioner's argument that the Subsection (g)(1) criterion may be applied only to the unreasonable burden determination (compare Pet. 5 with 749 F.2d at 850-851, 853). With regard to the second, *Pennsylvania* has no relevance to the Fifth Circuit's decision: the Commission in the instant case did not balance the public interest and unreasonable burden determinations against one another, but made separate and distinct determinations for each,[9] entirely consistently with the District

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[8]Unfortunately, the court of appeals accepted petitioner's mischaracterization of the decision in *Pennsylvania, supra*, as construing the statute differently from the former's decision (Pet. App. A2). As explained in the text, *infra*, it does not.

[9]Petitioner at one point concedes as much: "The ICC found that the RCT had failed to prove that discontinuance of service was inconsistent with the public interest or that continuance of service did not constitute an unreasonable burden on interstate commerce * * *" (Pet. 4). This belies its assertion later (*id.* at 9) that somehow the Commission did not

of Columbia Circuit's schema (compare, *e.g.*, Pet. App. C16 with 749 F.2d at 853).

3. Finally, the issue raised by this petition is of small and diminishing interest. The part of the Bus Act at issue applies to only a limited class of bus discontinuance requests: those by an interstate carrier to end intrastate service that was authorized before August 1, 1982 (49 U:S.C. 10935 (e)(1)(B)), where the ICC has overruled the state agency's denial. There is not likely to be a significant amount of future litigation involving this limited class, nor is the ruling here likely to be applicable to cases not in this class. In any event, only a handful of bus exit requests have been challenged in court and we know of only one exit case now in the courts which remotely might involve these issues.[10] Thus, there is no need for this Court to address the statutory provisions upon which this petition is based.

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make a determination as to unreasonable burden. Whatever the petition states, the Commission did find that petitioner had failed to demonstrate that continuing the line would not constitute an unreasonable burden on interstate commerce (Pet. App. C16, C20).

[10] *Public Service Commission* v. *ICC*, No. 85-1620 (4th Cir. filed June 24, 1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1985